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Supreme Court, U.S.
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No. 00-799

In The
Supreme Court of the United States

THE CITY OF LOS ANGELES,
Petitioner,

v.

ALAMEDA BOOKS, INC., and
HIGHLAND BOOKS, INC.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF AND APPENDIX OF THE FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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*Randall D.B. Tigue**
Chairman, Amicus Committee
First Amendment Lawyers Association
2940 Pillsbury Avenue South
Minneapolis, Minnesota 55408
(612) 825-0936
**Counsel of Record*

Bradley J. Shafer
National Chairman
First Amendment Lawyers Association
3800 Capital City Boulevard, Suite 2
Lansing, Michigan 48906-2110
(517) 886-6560

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae First Amendment Lawyers Association ("FALA")[1] is an Illinois not-for-profit corporation with some one hundred ninety-five members throughout the United States and Canada. Its membership consists of attorneys who regularly practice in the defense of First Amendment rights against governmental intrusion, and who regularly litigate various facets of the issues now before the Court. No less than three of its members are arguing cases before the Court this term. *Amicus* believes that reversing the decision of the Ninth Circuit in this action will result in significant erosion of First Amendment freedoms, will have the consequent effect of rendering as illusory judicial review of regulations impacting upon any form of sexually regulated expression, and will permit government to regulate the content of speech and expression predicated upon the pretextual incantation, and possibly non-existing concern, of the "secondary effects" of adult entertainment.

SUMMARY OF ARGUMENT

This Court should not relieve government of its evidentiary burdens under intermediate constitutional scrutiny by declaring, as a matter of law, that "secondary effects" are necessarily engendered by all forms of sexually related expression in all circumstances, and that any form of regulatory "experimentation" is therefore

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[1] Counsel for neither party authored the present *amicus* brief in whole or in part. Pursuant to Supreme Court Rule 37.6, no person or entity, other than the *Amicus Curiae*, its members, or its counsels, made any monetary contribution to the preparation or submission of the brief. Both parties have consented to the filing of this brief, and those consents are being filed separately with this Court.

permissible. This Court should zealously preserve both the government's obligation to establish a specified basis for enacting regulations that impact upon speech and expression related activities, and a litigant's right to contest the government's assertion of the existence of secondary effects motivation for enacting such laws.

Recent judicial decisions as well as analysis of both "older" and more recently conducted secondary effects studies bely any assertion that secondary effects can merely be presumed to derive from the operation of an "adult" entertainment establishment. In addition, a review of the 1977 Los Angeles secondary effects study reveals no basis for enactment of the zoning amendments at issue here. Finally, this Court should provide guidance for lower courts to use when considering the evidentiary implications of secondary effects information.

Amicus Curiae urges this Court to adopt the position taken by the Ninth Circuit below, and affirm its decision.

ARGUMENT

I. REVERSAL OF THE DECISION BELOW WILL MEAN NOTHING LESS THAN REJECTION OF THE INTERMEDIATE SCRUTINY STANDARD OF *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968) AS A FORMULA FOR CONSIDERING THE CONSTITUTIONALITY OF REGULATIONS IMPACTING UPON SEXUALLY RELATED EXPRESSION, AND ADOPTION RATHER OF A RATIONAL BASIS LEVEL OF ANALYSIS; A CONCERN SPECIFICALLY EXPRESSED TO THIS COURT BY APPELLEES IN *RENTON V. PLAYTIME THEATRES*, INC., 475 U.S. 41 (1986).

In the litigation that ultimately resulted in this Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the appellees[2] argued that the "adult" zoning ordinance at issue there, which regulated based upon the content of exhibited entertainment, was subject to strict scrutiny analysis. Brief of Appellees, No. 84-1360, at 19-21 ("The test of these restrictions *must* be 'strict scrutiny'") (emphasis in original). A majority of this Court determined, however, that zoning regulations of adult businesses which were enacted upon a concern of the "secondary effects" of such facilities needed only to pass constitutional muster under intermediate scrutiny (475 U.S. at 47-49), thereby invoking the standards of *United States v. O'Brien*, 391 U.S. 367 (1968).

The second and fourth prongs of that test are particularly relevant to the issues here, and evaluate, respectively: Whether the governmental regulation "*furthers* an important or substantial governmental interest," and whether the "incidental restriction on alleged First Amendment freedoms is no greater than is *essential* to the furtherance of that interest." *Id.* at 377 (emphasis added).

In response to the ruling of this Court in *Renton*, the appellees filed a Petition for Rehearing asserting:

> By allowing cities to use any evidence so long as it 'is reasonably believed to be relevant to the problem that the city addresses,' . . . the Court has abandoned the determination of whether or not a compelling governmental interest exists to

[2]Two businesses which desired to operate "adult" movie theaters in the City of Renton, Washington -- a municipality which had up to that point no existing "adult" uses.

political functionaries. No longer will regulatory bodies be required to offer empirical evidence to support their regulation of speech-related activities. Instead, they will be allowed to rely on *mere assertions*. Any decision they make is *effectively immunized from judicial scrutiny* since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for whatever speech related activity it finds distasteful or unwanted . . . .

* * *

> By abandoning the requirement for empirical evidence and adopting the totally subjective test of 'reasonably related to its purpose,' the Court has given cities a blank check to suppress or limit speech under the guise of zoning. This Court's direction to the lower courts is to blindly accept any contention of a secondary effect as a substantial governmental interest. *Furthermore, any means-end scrutiny test has been abandoned in favor of 'experimentation.'*

Petition for Rehearing, No. 84-1360, at 4-5, 7 (emphasis added, citations omitted).

These concerns were in reference to the conclusions reached by this Court that the First Amendment did not require a municipality, before enacting an ordinance, to "conduct new studies or

produce evidence independent of that already generated by other cities, so long as whatever evidence the city *relies upon is reasonably believed to be relevant* to the problem that the city addresses," and that cities "must be allowed a reasonable opportunity to *experiment* with solutions to" address the concerns of secondary effects. *Renton*, 475 U.S. at 51-52 (emphasis added), *partially quoting*, *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976)(plurality).

In essence, Playtime Theatres asserted that while giving lip service to the *O'Brien* standard, this Court was in all reality opening the door to constitutional adjudication of regulations directed at sexually related expression not under intermediate scrutiny, but utilizing mere rational basis analysis. The Court obviously rejected that contention as it denied the Petition for Rehearing. 475 U.S. 1132 (1986).

This case, however, represents the culmination of the concerns noted by Playtime Theatres. The City of Los Angeles and its *amici* ask this Court to reverse the Ninth Circuit and conclude that in litigation concerning the constitutionality of regulations of *any form* of sexually related expression, the government need *not* be put to *any* burden of establishing the fulfillment of the second or fourth prongs of the *O'Brien* test, other than having merely uttered the words "secondary effects." In reality, what they argue for this Court to adopt here is virtually rational basis scrutiny, or no scrutiny at all.[3] And, they desire to

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[3]*See, e.g.*, Brief of *Amici Curiae* American Planning Assoc. and Community Defense Counsel Brief, at 23 ("Contrary to the Ninth Circuit's opinion, this Court has never held that every application of the ordinance has to effectively eliminate secondary effects"); Capital Resource Institute & Campaign for California Families as *Amici Curiae* at 6 (". . . where a State's determination as to secondary effects relies on 'various unproveable assumptions' there is no offense to the Constitution").

have this Court render as mere *dicta* the "reliance" component for supporting evidence as set forth in *Renton*, as they believe that a proponent of speech and expression should be completely foreclosed from litigating the question of whether a municipality "reasonably believed" information alleged to justify enactment of a regulation was indeed relevant to the concerns at hand.

The best recitation of the distinction which lower courts perceive between the intermediate level of scrutiny that is still theoretically applicable to evaluating the constitutionality of regulations that impact upon sexually related expression and that of mere rational basis scrutiny is found in *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998):

> . . . *Renton* teaches us that the government must produce *some* evidence of adverse secondary effects produced by public nudity, as applied to nude dancing, or adult entertainment in order to justify a challenged enactment using the secondary effects doctrine . . . . '[U]nlike our review under a standard of rationality, we will not hypothesize such an objective or accept a naked assertion. Rather, we intrude into the regulatory decision process to the extent that we insist upon objective evidence of purpose' a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content' . . . . 'To insist on less is to reduce the First Amendment to a *charade*.'

Id. at 371-73 (first emphasis in original and second added), *quoting, SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988); and *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3rd Cir. 1997) (*en banc*).

Amicus FALA believes that if this Court reverses the Ninth Circuit, it will have then indeed reduced the First Amendment to a mere "*charade*," and reference to a number of recent lower court decisions illustrates that "interpretation" of the secondary effects doctrine has indeed taken the judiciary well down such a precarious path.

In *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998), the Sixth Circuit considered the constitutionality of a state statute which limited the hours-of-operation of certain defined adult entertainment establishments. The court began its analysis by agreeing with the plaintiff there that the legislation at issue was "obviously not content-neutral" (referring to the third *O'Brien* factor) in that the law singled out "certain establishments for regulation based only on the type of literature they distribute" (*id.* at 438-9), but nevertheless asserted that:

> . . . [A] kind of *legal fiction* has been created that calls regulation of such literature 'content-neutral' when what is meant is only that the regulation is constitutionally valid.

Id. at 440 (emphasis added). This "legal fiction" led the court to conclude that an *O'Brien* analysis was unnecessary, and that the "real question" was rather "one of reasonableness." *Id.*

Another federal appellate court has interpreted the secondary effects doctrine to require rejection of the truth by the judiciary.[4] In a case where the Seventh Circuit also evaluated the constitutionality of an hours-of-operation restriction, the plaintiff there had presented proofs demonstrating that not only was there no relationship between an adult-oriented business' hours of operation and crime *in general*, but that there was no such correlation between the plaintiff's establishment and crime *in specific*. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999).

In concluding that the "district court properly *rejected* this evidence," the appellate court noted:

> DiMa's contradictory evidence would be highly prohibitive if our task were to discover the *objective truth* about the effect of Pure Pleasure's operating in Hallie. But our task under the First Amendment is *far different*.[5]

185 F.3d at 831 (emphasis added).

While predating this Court's decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the presentation by

[4]Cf., F.R.E. Rule 102 ("These rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined") (emphasis added).

[5]*See also, International Eateries of America v. Broward County*, 941 F.2d 1157, 1163 (11th Cir. 1991) (the appellate court there noting that the plaintiff had argued that "there is *uncontradicted evidence* in the record that Thee Dollhouse III has not in fact caused any adverse effects on surrounding property values and that property values have actually *increased at a higher rate* than before the opening of Thee Dollhouse III. *This argument holds no weight*") (emphasis added).

DiMa of such contradictory evidence is *exactly* what the plurality opinion authored by Justice O'Connor appears to permit.[6] Nevertheless, this Court ultimately denied certiorari in *DiMa*. 529 U.S. 1067 (2000).

Perhaps the most questionable extension of the secondary effects doctrine was reached recently in *Voyeur Dorm, L.C. v. City of Tampa*, 121 F.Supp.2d 1373 (M.D. Fla. 2000). There, the City of Tampa applied an adult zoning ordinance (prohibiting an "adult" establishment in a residential zoning district) against a dormitory of five women that had internet cameras located throughout, with the images then, for a fee, being broadcast to customers across the world wide web. *Id.* at 1375-76. It was established that no member of the public was ever offered "any adult entertainment *on* the premises," and that the viewing took place in "virtual space. . . ." *Id.* at 1377 (emphasis in original). In upholding the application of the zoning ordinance to the dorm, the district court permitted reliance upon other secondary effects studies, and found no distinction whatsoever in the fact that at issue was a mere residence that never attracted even a single patron to its premises. *Id.* at 1379-1381.

In addition, the secondary effects doctrine and a seeming lack of clarity in regard to its limitations and parameters, has emboldened governmental entities to enact an ever-widening array of regulations directed at sexually related expression, no matter how absurd. For example, Illinois (and various of its municipalities)

[6]*See*, 529 U.S. at 298 ("Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. . . . In the absence of any reason to doubt it, the city's expert judgment should be credited") (plurality).

adopted zoning regulations requiring adult businesses to be locationally dispersed from uninhabited forest preserves. *See, e.g, Palmetto Properties, Inc. v. County of Dupage*, ___ F.Supp.2d ___, 2001 WL 315180 (N.D. Ill. March 29, 2001).

In the same vein, the City of Bangor, Maine, enacted what the District Court described as a "unique" regulation "not modeled on any existing ordinances," which precluded the issuance of a certificate of occupancy to any individual desiring to run a business offering nude dancing if the applicant also operated any of a number of other businesses, including a booking agency. *Diva's, Inc. v. City of Bangor*, 21 F.Supp.2d 60, 62-65 (D. Maine 1998).

Other municipalities have, in the name of secondary effects, enacted licensing ordinances for adult business owners, employees, and entertainers requiring as a predicate to license issuance such things as *disclosure of the applicant's mental history for the past ten years*, multiple affidavits of "good moral character," and verification as to certain medical conditions. App. 43-52. These ordinances have even gone so far as to preclude an applicant from obtaining a license to own, work at, or entertain in an adult entertainment facility if the individual possesses a similar license *anywhere in the United States, Canada, or South America!* App. 49, 52. Mexico or Belize would, however, be fine.

These few examples are not mere aberrations, and the members of *Amicus* are regularly required to litigate the constitutionality of identical, similar, and even more nonsensical regulatory provisions. It is these types

of overbearing regulations that Petitioner and its *amici* seek to immunize from judicial scrutiny.

They desire this Court to endorse a construct of the secondary effects doctrine, exemplified by *Richland Bookmart*, *DiMa*, and *Voyeur Dorm*, where any analysis under *O'Brien* is either dead or meaningless, where virtual rational basis scrutiny prevails, and where the truth is not only irrelevant, but if found to be inapposite to the conclusion that a municipality desires to reach, is simply to be "rejected."

These decisions, and others like them, may stem from the fractured nature of the Court's most recent pronouncements in this area as exemplified by the two plurality opinions in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *Pap's*, or they may represent unintended (by this Court) aberrant misinterpretations of the secondary effects doctrine. Regardless, they pose a real and serious threat of erosion to First Amendment protections.

Accordingly, in response to this seemingly never-ending watering down of the protections afforded by the secondary effects doctrine (i.e., *real* intermediate scrutiny), the FALA here discusses decisions which have recognized the lack of connection between expressive activities and secondary effects; the supposed findings of the "secondary effects studies" which are relied upon by municipalities across the country in order to justify regulation of sexually-related expression; the results of more recently conducted secondary effects studies performed utilizing sound methodological standards -- including those undertaken by government itself -- which fail to establish *any* connection between the types of adult-oriented businesses of today and perceived negative

secondary effects; and the constitutional ramifications of adopting the dangerous legal standards proposed by the City of Los Angeles and its *amici*.

II. THIS COURT SHOULD NOT ADOPT THE IRREBUTABLE PRESUMPTION THAT SEXUALLY RELATED EXPRESSION NECESSARILY ENGENDERS ADVERSE "SECONDARY EFFECTS."

A. JUDICIAL DECISIONS BELIE THE NOTION THAT "SECONDARY EFFECTS" CAN BE PRESUMED TO EMANATE FROM SEXUALLY RELATED EXPRESSION.

Petitioner's *amici* contend that evidentiary substantiation of adverse secondary effects being associated with certain categories of expression is unnecessary because "we just know" this connection exists, with *amici* Morality in Media, Inc., even going so far as to state that legislation can be predicated upon reference to the "collective common sense." Brief *Amicus Curiae* of Morality in Media, Inc., at 10. What if, however, the "collective common sense" is not supported in either truth or fact, but is rather merely used as a fictional and thus pretextual justification for restricting or banning a form of expression that some may feel to be undesirable?[7]

Certainly, there is no more long-standing assumption by this Court in regard to "adult" entertainment establishments than the belief that the combination of alcohol and forms of nude and/or semi-nude dancing creates a synergistic effect resulting in the increase in crime. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (in

[7] Indeed, a tool of censors throughout the ages has been to appeal to bigotry and prejudice and call it "common sense."

upholding a regulation that banned topless dancing in establishments that were licensed to sell alcoholic beverages, the Court cited to the New York State Legislative Annual 150 (1977), which stated that "*[c]ommon* sense indicates that any form of *nudity coupled with alcohol in a public place begets undesirable behavior*") (emphasis added). *See also, City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 96 (1986); *California v. La Rue*, 409 U.S. 109, 114, 118 (1972); and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975).

Yet, is this "common sense" such a certainty that courts should merely dismiss any examination of, or challenge to, this supposed connection? A federal appellate court recently and appropriately answered in the negative.

In *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), the County commissioned its police department to conduct a study of the crime statistics concerning twelve drinking establishments; six featuring adult entertainment and six that did not. The study concluded that:

> . . . [T]here was no statistical correlation showing an increase in crime in adult entertainment establishments that served alcoholic beverages. *Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages.*

Id. at 979 (emphasis added).

The six adult dance clubs also had conducted an additional study which examined their "economic impact upon their surrounding environs." *Id.* That study did "not identify any detrimental impacts as caused by the Clubs." The County then commissioned an analysis and critique of that study, which validated its findings and concluded that the "Clubs had caused no quantifiable 'blight' upon their environs." *Id.* at 989-990.[8]

Nevertheless, the County enacted an ordinance prohibiting the sale or consumption of alcoholic beverages on the premises of adult entertainment establishments predicated upon the concern of "negative secondary effects," and based this enactment "upon the experience of other urban counties and municipalities. . . ." *Id.* at 980-81.

The Eleventh Circuit began its analysis by noting that it could find "no basis" for the defendants' contention that pursuant to *Barnes* and *Pap's*, the Court could merely "presume the evidence needed to meet the second prong [furthering a governmental interest] of the *O'Brien* test." *Id.* at 985 (clarification added). The court observed, further, that unlike in *Pap's* and its own earlier decision in *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 529 U.S. 1052 (2000), the adult businesses had "unequivocally" "challenged and disproved the board's findings." *Id.* at 986. Accordingly, the Eleventh Circuit concluded that, in the language of *Renton*, "it was *unreasonable* for Defendants to have relied upon remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were *not relevant* to local conditions." *Id.* at 986 (emphasis added).

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[8]These studies, in their entireties, have been lodged with the Clerk of this Court by this *Amicus*.

The Eleventh Circuit also commented that, unlike *Renton*, this was not a circumstance where an adult business either did not exist or had just moved into town, and that the businesses in question in Fulton County had operated for nearly a decade. *Id.* Thus, "reliance" upon "foreign" studies was simply not necessary.

Yet, the Fulton County studies are not the only ones to dispel the assumption that the combination of adult entertainment and alcohol necessarily begets undesirable consequences. When the secondary effects doctrine was in its mere infancy, a study conducted in 1978 in St. Paul, Minnesota, reached the exact same result. *See*, excerpts attached at App. 53-64. That study represents the "most methodologically sound of all of the empirical research" constituting the older secondary effects studies, Bryant Paul, et al., *Government Regulation of 'Adult' Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, Communication Law and Policy, Vol. 6, No. 2, Spring, 2001 (hereinafter "*Paul*"), at 375, and is one of the myriad of studies that Petitioner's *amici* refer to as the "well-documented" proposition that "adult businesses engender undesirable secondary effects . . . ." Brief of Ohio and 24 States as *Amicus Curiae*, at 5.

Thus, the "common sense" does not apply to all places and in all circumstances. Perhaps businesses have changed, or perhaps other regulations remedy secondary problems (such as liquor license revocation for violations of lewdness regulations). Regardless, if the argument of *amicis* Capital Resource that "reliance on twenty-year-old studies is reasonable" (*Brief*, at 9) is to be taken literally, these reports, undertaken by *governmental* entities, would compel the conclusion that there is no basis whatsoever

for precluding, *anywhere*, nude dancing in places that serve alcoholic beverages.

Flanigan's Enterprises is not the only recent judicial decision to recognize the absence of secondary effects in regard to adult entertainment businesses. *See, e.g., Erie Boulevard Triangle Corporation v. City of Schenectady*, 2001 U.S. Dist. LEXIS 8807, at *3 (N.D. N.Y. June 29, 2001) (the court noting that it was "*undisputed*" that adult locations had existed in the City of Schenectady since 1973 "*without any identifiable impact upon the surrounding areas related to the operation of either plaintiffs' adult bookstores*") (emphasis added).[9]

Similarly, in *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998), the district court was confronted by an initial adult zoning ordinance that required certain minimum distances between adult uses and specified protected land uses, and then an amendment to that ordinance that merely arbitrarily increased those distances. Both ordinances were enacted predicated upon the assertion of "secondary effects," although no new evidence was submitted to justify the increases of the buffering zones. *Id.* at 800-813. The district court ruled the amended zoning ordinance unconstitutional, in part as an impermissible content-based motivated regulation, *id.* at 810, and noted that

[9] *See also, Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). There, the city council had received a memorandum from the city manager indicating that "there were no particular crime problems emanating from the topless establishments." *Id.* at 852. The memorandum referred to a study by the Pensacola Chief of Police, and stated that "[t]he police department cannot substantiate that problems occur any more frequently at topless bars than they do at non-topless bars. The question of municipal regulation, in this instance, relates to the moral issue involved, rather than the law enforcement issue." *Id.* at 853 n.1 (emphasis added).

there seemed to be specific interest during the committee hearings of an intention to close many, if not most, of the city's adult entertainment facilities. *Id.* at 812.

In addition, the court concluded that once having chosen its method of regulation, government could not increase those restrictions without justification. *Id.* at 811-12. Specifically, the court concluded that the legislative record did not demonstrate why the "earlier distance requirements" did not "adequately address the negative secondary effects previously found to exist," nor did it provide "any useful evidence or discussion regarding whether, since the time the previous distance requirements were adopted, sexually oriented businesses have continued to exert specific negative secondary effects . . . ." *Id.* at 813. *Accord, Erie Boulevard Triangle*, at *13-*14.

Another example of a municipality which ignored its own findings (similar to the circumstances in *Flanigan's Enterprises*) is that of Lakewood, Washington. There, the city uncovered the "depressing statistic" that there was absolutely no demonstrated connection between crime rates and adult entertainment establishments. App. 65.[10] Representatives of the municipality even tried "working this issue from a number of different angles" in order to construct a nexus between adult businesses and crime, but were unsuccessful. In reference to the attorney representing the adult businesses there (who was also counsel before this Court in *Renton)*, the memorandum notes: "Jack

[10] Undated memorandum of David Bugher, Community Development Director for the City of Lakewood, Washington, to Daniel Heid, City Attorney for the City of Lakewood, Washington, disclosed in discovery in the case of *Byran Clark v. City of Lakewood*, United States District Court for the Western District of Washington, Case No. C98-5341 RJB.

Burns will love this." *Id.* The city officials then adjourned into Star Chamber-like secret proceedings in an effort to "find" secondary effects, and then enacted a comprehensive regulatory ordinance of adult businesses. Finding the conduct of the City in these circumstances to have been reprehensible, the Ninth Circuit recently reversed a lower court decision dismissing a constitutional challenge against that ordinance. *Clark v. City of Lakewood*, 2001 WL 877062 (9th Cir. Aug. 6, 2001).

One additional recently issued opinion further exemplifies why the existence of secondary effects should not merely be irrebuttably "presumed." In *XLP Corporation v. The County of Lake*, 743 N.E.2d 162 (Ill. App. 2000), the Illinois Court of Appeals was asked to evaluate the propriety of a trial court having granted a motion to dismiss a lawsuit challenging various adult business licensing regulations. At issue there were two nude dancing establishments and two adult bookstores. *Id.* at 164. The plaintiffs had asserted in their complaint that because they had existed in the county for fifteen years, it was improper for the County to have relied upon, as a predicate for enacting the ordinance, studies "conducted by other municipalities regarding adverse impacts associated with adult uses," and that the defendant could not demonstrate the existence of any such secondary effects in the county or with regard to the plaintiffs' establishments. *Id.* at 166-67.

The Court of Appeals rejected the contention that mere recitation in the preambles of the ordinance to other studies of secondary effects was sufficient to carry the government's burden. *Id.* at 167. "In every case relied upon by defendant, the affected party had an opportunity to go to trial or to test the assertions of governmental interests in an evidentiary proceeding." *Id.* at 168. In

encapsulating the position argued here by this *Amicus*, the Illinois Court of Appeals addressed the *Renton* "reliance on the experiences of other municipalities" issue by noting:

> However, this conclusion by the *Renton* Court has to be considered in the context of that case. In *Renton*, there were no adult businesses in existence at the time the City enacted its ordinance. Consequently, the Supreme Court determined that the City of Renton could rely on the experiences of other communities, in particular those of Seattle, which had conducted detailed studies of adult use businesses, to adopt its ordinance. Here, however, where plaintiffs had been in business for 15 years at the time defendant enacted its ordinance, plaintiffs' allegation that defendant wrongly relied on outside studies instead of considering plaintiffs' existing businesses to determine whether such businesses cause adverse secondary effects presented an issue of fact.

Id. at 170.

The ability to litigate this "issue of fact" should be preserved by this Court, and a review of the oft-"relied upon evidence" further demonstrates why.

B. PEER-REVIEWED CRITICAL ANALYSIS OF THE "OLDER" SECONDARY EFFECTS STUDIES CASTS SIGNIFICANT DOUBT UPON THE ASSERTED NEXUS BETWEEN ADULT

ENTERTAINMENT ESTABLISHMENTS AND SECONDARY EFFECTS.

In its *amicus* brief in *Pap's*, the FALA presented a detailed analysis of the older type of "secondary effects studies" that municipalities rely upon in adopting regulations directed at sexually related expression. *See*, Brief and Appendix of the First Amendment Lawyers Association as *Amicus Curiae* in Support of Affirmance, No. 98-1161, at App. 1-29; 55-58. That analysis was penned by Dr. Daniel Linz of the Law and Society Program at the University of California, Santa Barbara. Both the plurality opinion authored by Justice O'Connor and Justice Souter's partial concurrence and partial dissent referred to those materials. *See*, 120 S.Ct. at 1396 (plurality); and 120 S.Ct. at 1404 n.3 (Souter, J., concurring in part and dissenting in part).

Dr. Linz presents a further paper here (in part analyzing the application of the 1977 Los Angeles Study to the "multiple use" regulations at issue here), which is found at App.1-42 and for clarification sake will be referred to here as "*Linz*."

There, Dr. Linz and Ph.D. candidate Mr. Bryant Paul explain that following the filing of their initial findings to this Court in *Pap's*, that paper was submitted at the Annual Meeting of the International Communication Association, 2000, and received a "Top Three Refereed Papers in Communication Law and Policy" award following peer-review. The paper was later subjected to further peer-review and was ultimately published as *Paul*, referenced *supra*. *Linz*, App. 5.

Double peer-review and subsequent publication certainly should lend at least some credence and weight

to the conclusions reached by Dr. Linz in light of the standards set forth by this Court for the admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-95 (1993) (peer review and publication being factors that a federal judge can consider when determining the admissibility of expert witness testimony).

Following analysis of these older materials, and in particular the ten most commonly "relied upon" studies, Dr. Linz and Mr. Paul concluded that -- with few exceptions – their scientific validity is questionable and their methodologies are seriously and often fatally flawed, and that for those studies that were conducted in a credible manner, they demonstrated either no negative secondary effects associated with adult businesses or actually a reversal of the presumed negative effects (i.e., areas with adult businesses had *lower* crime rates and *higher* property values). *Paul*, at 386-87. These conclusions should permit parties affected by regulations directed at speech related activities to at the very least not only question, but to indeed litigate the factual claim that particular sexually related expression engenders some form of adverse secondary effects so as to warrant regulation thereof.

C. RECENTLY CONDUCTED STUDIES USING SOUND METHODOLOGY DO NOT SUPPORT AN ASSUMED CONNECTION BETWEEN ADULT ENTERTAINMENT ESTABLISHMENTS AND ADVERSE SECONDARY EFFECTS.

In his paper presented here, Dr. Linz moves beyond a mere critique of the "older" secondary effects studies, and analyzes and comments upon newer studies using proper scientific methodologies (including some

that he has participated in conducting) which demonstrate no such connection between adult uses and secondary effects.[11]

Initially, Dr. Linz establishes a set of criteria that he believes are questions that a court should ask in evaluating the credibility and relevance of (and thus "reasonable reliance" upon) any challenged secondary effects information. App. 7-13. Using these standards, Dr. Linz then analyzes the Fulton County studies underlying the Eleventh Circuit's decision in *Flanigan's Enterprises*, and notes that they (of course) fail to demonstrate a connection of either crime or urban blight to adult entertainment establishments. App. 27-28.

Dr. Linz further discusses recent crime and property value studies conducted in relation to adult businesses in Charlotte/Mecklenburg County, North Carolina. App. 28-31. The property value study showed that there was "no evidence that negative secondary effects on house price appreciation can be found in two decades of housing transactions in Mecklenburg County." App. 29. The crime study, conducted primarily by Dr. Kenneth Land of Duke University and utilizing data from the United States Department of Justice Office of Community Oriented Policing Services, concluded that in *all six* of the crime categories investigated,[12] the overall numbers of crime incidents for all three years combined were "*substantially less* in the areas surrounding the adult nightclubs than in the areas surrounding the control (non-adult) sites." App. 31 (emphasis in original).

[11] All of these studies have been lodged with the Clerk of this Court.

[12] Total crimes; total Uniform Crime Reports Index Crimes; Total Uniform Crime Reports Violent Crime Index Crimes (murder, rape, aggravated assault, robbery); Total Uniform Crime Reports Property Crime Index Crimes (burglary, larceny, theft, motor vehicle theft, arson); Sex Crimes; and all other crimes. App. 31.

Also commented upon by Dr. Linz is a study of crime that he conducted in Ft. Wayne, Indiana, concerning the exotic dance clubs[13] there. App. 32-34. His conclusion was that there was "no empirical evidence of the existence of adverse secondary effects, in the form of crime, surrounding exotic dance businesses in Ft. Wayne." App. 33.

III. A CRITICAL EXAMINATION OF THE 1977 LOS ANGELES SECONDARY EFFECTS STUDY FAILS TO DEMONSTRATE ANY CONNECTION BETWEEN ADULT BUSINESSES AND ADVERSE SECONDARY EFFECTS, OR JUSTIFICATION FOR THE ORDINANCE AMENDMENT AT ISSUE.

In addition to the arguments of the parties in this action, this Court has at its disposal at least two other analyses of the 1977 Los Angeles study that supposedly served as the basis for the zoning amendments at issue. *Paul* indicates that "[t]his study is perhaps the most often *incorrectly referenced* of any empirical research investigating the effects of adult-oriented businesses on surrounding areas." *Id.* at 377 (emphasis added). An abbreviated discussion of that study notes no objective findings of the existence of secondary effects. *Id.* at 377-379.

Here, Dr. Linz and Mr. Paul provide a more comprehensive analysis (App. 13-25) and remark that a portion of the study actually showed *higher* property values in adult areas than non-adult control areas; that the methodologies used in most portions of the study were flawed; and that there was no objective evidence

[13] Those establishments require entertainers to wear "pasties and G-strings" consistent with this Court's decision in *Barnes*. App. 32 n.8.

produced that established a connection between adult entertainment establishments and negative secondary effects. *Id.* In addition, they discuss the portion of the 1977 study which the Ninth Circuit apparently relied upon for its conclusion that there was *some* evidence of a connection to secondary effects, and note that this "special" police department study does *not* establish a nexus between adult entertainment establishments and higher crime rates, but merely observes that the Hollywood area of Los Angeles had a higher crime rate than the remainder of the city. App. 22-25. Most importantly, they conclude that the 1997 report contains no information justifying the "multiple use" ordinance amendment. App. 25.

IV. WHY THIS COURT SHOULD NOT PERMIT MERE DEFERENCE TO THE "OLD" "SECONDARY EFFECTS STUDIES" IN ALL CIRCUMSTANCES.

Amici Capital Resource Institute assert that the determination of whether adult entertainment establishments create secondary effects should be a question determined as a matter of law, and that "reliance on twenty-year-old studies is reasonable." Brief of Capitol Resource Institute, et al., as *Amici Curiae*, at 5, 9. Basically, what they contend (and the other *amici* do not appear to dispute) is that because there are "old" studies supposedly "documenting" a relationship between certain forms of adult entertainment establishments in the past and secondary effects, the Court should determine that *for all time and in all circumstances* in regard to any form of sexually related expression, this "connection" is a legal "given" that should never be subject to challenge. For the following reasons, this Court should reject such a drastic departure from its previous First Amendment jurisprudence.

First, even under low level scrutiny, this Court has long noted the ability to challenge the legislative predicates of governmental enactments. "[N]o pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis." *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 (1937). And, certainly, there should be a greater ability to refute such legislative assertions under intermediate or higher First Amendment scrutiny. *See, e.g.*, the unanimous opinion of the Court authored by then (now Chief) Justice Rehnquist in *Los Angeles v. Preferred Communications*, 476 U.S. 488, 494-96 (1986). Yet, the standard which the Petitioner and its *amici* urge this Court to adopt would, without question or justifiable basis, reverse these long-standing precedents of the Court.[14]

Second, the older secondary effects studies that governments tend to "rely" upon do not necessarily reach the type of conclusions regarding a connection between adult entertainment establishments and secondary effects that the regulatory proponents assert they so hold. Certainly, as has been discussed, *supra*, the 1977 Los Angeles study, the 1978 St. Paul study, and the more recent Fulton County studies specifically and explicitly in numerous regards *disclaim* such a nexus. The goal of the courts is, after all, the ascertainment of truth, and the

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[14] Compare, *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3rd Cir. 1986), in which new factual evidence led that court to invalidate, on First Amendment grounds, a solicitation ordinance which it had upheld only two years earlier in *Pennsylvania Alliance for Jobs and Energy v. Borough of Manhall*, 743 F.2d 182 (3rd Cir. 1984).

methodological deficiencies of the oft-relied upon studies as discussed in detail in *Paul* alone should cause courts to question, and permit litigants to attempt to refute, any asserted relationship between expression (or places thereof) and secondary effects.

Third, such deference would ignore the efficacy of previously enacted regulations and preclude a court from ever asking the question of "when is enough enough?" Lost in the numerous arguments of the Petitioner and its *amici* is any discussion of the effect that the earlier L.A. zoning regulations may have had in ameliorating secondary effects; which, after all, was *supposedly* the entire purpose of enacting those provisions in the first place.

"Experimentation" in the language of *Renton* (475 U.S. at 52) and *Young* (427 U.S. at 71) presupposes, of course, an examination -- at some point -- of whether a particular modality of regulation "works." Yet, Petitioner and its *amici* are in an interesting logical predicament, in that they assert that ever-more restrictions of adult businesses will be necessary in order to alleviate supposed adverse secondary effects, but they never want to examine, or even permit a court to investigate, whether previously enacted regulations corrected the problems that the government asserts existed in the past. In fact, regulating on the basis of secondary effects after earlier legislation had already been passed to control such perceived problems (as Los Angeles has done here), requires the government to adopt the bizarre assumption that their initial law was ineffective and had no substantial impact upon secondary effects. This then circuitously leads to the further conclusion that the prior regulation was not justified in the first place as it did not fulfill the second prong of *O'Brien*.

Fourth, to eviscerate any form of judicial review in regard to the existence of, or legitimate concern over, secondary effects as a necessary predicate for the enactment of laws directed to regulate -- if not out-right ban -- certain forms of expressive activities, will inevitably lead to the pretextual passage of legislation predicated upon the dislike for the *content* of certain expression, as opposed to the supposed negative by-products of such speech and conduct. Numerous courts have certainly found that this has already occurred. *See, e.g., Krueger*, 759 F.2d at 853 n.1; *N.W. Enterprises*, 27 F.Supp.2d at 812. *See also, Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1281 (11th Cir. 2001) (anti-nude entertainment statute appeared to be "at first blush" intended to suppress the message and content of expression as opposed to dealing with secondary effects).

Irrebuttably presuming the existence of secondary effects gives the government *carte blanche* ability to regulate and indeed ban speech and expression merely by muttering the two magical words. Yet, with now a full quarter century of experience post *Young* of zoning regulations prescribing the location of adult businesses based upon the concern of secondary effects, and ten years experience since *Barnes* gave government the right to prohibit nude performance dance entertainment predicated upon the same concerns, there is now existing a lengthy and detailed history of the efficacy of such regulations.

Expanding restrictions of sexually related expression at this point -- without demonstration of continuing or further problems emanating from such activities (such as is exemplified by the actions of Los Angeles here and the other ordinances and statutes

discussed, *supra*) -- is not, *Amicus* submits, further "experimentation" to address the perceived problems of secondary effects, but is, rather, simply experimentation meant to drive certain speech and expression from the marketplace by the creation of such a suffocating array of regulations that no business could operate thereunder. This concern is particularly exemplified by the circumstances in such cases as *Flanigan's Enterprises* and *Clark*, where government searched far and wide for secondary effects, found no problems, but enacted additional regulations anyway.

When it can be argued that a regulation of speech or expression has been enacted for pretextual reasons, heightened constitutional scrutiny is mandated.[15]

V. STANDARDS THAT THIS COURT SHOULD UTILIZE IN PROVIDING DIRECTION TO LOWER COURTS IN THE EVALUATION OF SECONDARY EFFECTS INFORMATION.

Certainly, no one contends that secondary effects information must first pass muster under the *Daubert* standard before it can be "reasonably relied" upon by a

[15] *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986)(if a city were to use an otherwise neutral law "as a pretext for closing down a bookstore . . . because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review")(O'Connor, J., concurring); and *Young*, 427 U.S. 71 & n.35 (in rejecting a constitutional challenge to the Detroit zoning ordinance, the plurality noted that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech," and observed that the District Court had found that "[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones")(plurality).

municipality as a predicate for enacting regulations. *Linz*, App. 7; *Paul*, at 370-71. *See also, Nixon v. Shrink Missouri Gov't. PAC*, 528 U.S. 377 (2000).[16] However, the decisions referenced, *supra*, illustrate that courts are now being confronted with *evidence*, in light of the plurality's comments in *Pap's*, seeking to dispel the assertion that adult entertainment establishments are associated with such adverse consequences. Because this issue will continue to engender litigation in the future, *Amicus* FALA believes that this Court should provide some minimal guidance to the lower courts in evaluating secondary effects information in light of the *O'Brien* test.

In their attached paper, Dr. Linz and Mr. Paul provide, and describe in detail, a four-part analysis that they believe should be engaged in by courts when evaluating challenged secondary effects information. A study, they opine, should be examined in order to determine whether it answers or violates the following principles: 1) "Compared to what?" 2) "Is this just a one-time fluke?" 3) "Is crime measured according to a reliable source?" and "Did the government go looking for more crime to justify its legislation?" and 4) "Did the investigators talk only to people who would give them answers they wanted to hear?" App. 10.

The relevance and utility of these four questions is discussed at App. 7-13, 38-42, and *Amicus* urges this Court to adopt these standards as guidelines for courts to utilize when confronted with a challenge to the predicate argument of secondary effects as being a basis to justify

[16] Nevertheless, evidence -- and not mere speculation -- is mandated. *See, e.g., Renton*, 475 U.S. at 51-52 (. . . "so long as whatever evidence the city relies upon . . . .") (emphasis added); and *Young*, 427 U.S. at 71 ("the record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect") (plurality) (emphasis added).

regulations impacting upon speech and expression related activities.

VI. CONCLUSION

Amicus FALA urges this Honorable Court to affirm the decision of the Ninth Circuit, to reject any contention that "secondary effects" can be irrebuttably presumed to exist, and to reject the argument of the Petitioner and its *amici* that virtual rational basis scrutiny should be applied in circumstances such as the one at bar.

Respectfully Submitted,

Bradley J. Shafer
National Chairman
First Amendment
Lawyers Association
3800 Capital City Blvd., #2
Lansing, MI 48906-2110
(517) 886-6560

Randall D.B. Tigue*
Chairman, *Amicus* Committee
First Amendment
Lawyers Association
2940 Pillsbury Avenue South
Minneapolis, MN 55408
(612) 825-0936
**Counsel of Record*

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PAPER ON THE APPLICABILITY OF THE 1977 LOS ANGELES SECONDARY EFFECTS STUDY AS A BASIS TO JUSTIFY THE PRECLUSION OF "MULTIPLE USE" ADULT BUSINESSES, AND AN ANALYSIS OF MORE RECENTLY CONDUCTED "SECONDARY EFFECTS" STUDIES.

BY:
DR. DANIEL LINZ, Ph.D.[*]
AND
BRYANT PAUL[**]

PRESENTED IN SUPPORT OF THE AMICUS CURIAE BRIEF OF THE FIRST AMENDMENT LAWYERS ASSOCIATION

INTRODUCTION

In its decision now under review by this Court, the Ninth Circuit ruled that the City of Los Angeles had a substantial governmental interest in reducing neighborhood crimes that were presumably associated with the existence of "adult" businesses. *Alameda Books, Inc. v. City of Los Angeles,* 222 F.3d 719 (9th Circuit 2001), *cert. granted.*

The primary evidence propounded by Los Angeles to establish this concern, and to then justify a subsequent prohibition of "multiple use" adult businesses, was a 1977 study undertaken at the request

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[*]Professor, Department of Communication and Law and Society Program, University of California, Santa Barbara.
[**] Ph.D. Candidate, Department of Communication, University of California, Santa Barbara.

of the City Council by the city's Department of Planning in cooperation with the local police department.

At issue for the Ninth Circuit was the question of whether the latter regulations devised by the City were designed to serve this governmental interest. In the case now before it, the Court will examine just what interests are implicated by the 1977 LA Study, and evaluate whether the Study could factually serve as a basis for enacting the 1983 ordinance amendments that prohibit the establishment of "combination" businesses.

In this paper, we attempt to aid the Court in examining these questions, while also seeking to provide further information to the Court concerning its more general consideration of the "secondary effects" doctrine.

Our analysis consists of the following:

First, we establish that the most frequently cited secondary effects studies, including the 1977 Los Angeles Study, show no objective evidence of a relationship between the existence and/or concentration of adult businesses and negative secondary effects. This raises the question of whether there is an appropriate foundation for enacting, under the justification moniker of "secondary effects," an ever-widening array of regulations directed at "adult" businesses.

Second, we set forth certain scientific, and indeed common sense, criteria that we believe should be used in order to evaluate whether any specific "secondary effects" study can be expected to have sufficient trustworthiness so that its results can be reasonably relied upon as the basis for legislative

decisions. We offer these requirements as reasonable thresholds that we believe should be transcended when considering allegations of "secondary effects" as a basis for legislation. These thresholds or critical questions that may be asked about a study will permit the Court to distinguish objective and fair assertions of the existence of secondary effects from mere unfounded allegations.

Third, we engage in a critical review of the 1977 "secondary effects" study undertaken at the request of the Los Angeles City Council *in light of these basic requirements* for reasonable reliance on a study's findings.

We attempt to determine: What secondary effects, if any, were found to be associated with "adult" establishments in the City of Los Angeles. Our review of this study finds that in most respects, that study *does not* establish a connection between the existence of an adult business and increases in crime and urban blight and decreases in property values. We find that the study does not even demonstrate the *general* effects of increases in crime or decreases in property values as the result of the concentration of such businesses -- inapposite to the claims of Los Angeles -- much less the *particularized* effects concerning combinations of such businesses at the same location.

We further find that in those few instances where a connection is alleged or implied, the conclusions are predicated upon unscientific and/or flawed methodology so facially apparent that no court should be able to conclude that a legislative body could have reasonably relied upon it as a basis for enacting certain regulations. Because of the lack of true findings in regard to a connection between adult businesses and

negative secondary effects and the significant methodological flaws found in the 1977 Study, we conclude that there is certainly no sufficient justification for the City of Los Angeles to be able to utilize that Report in order to preclude "multiple use" adult businesses.

Fourth, we synopsize and review for this Court a series of more recently conducted "secondary effects" studies of adult businesses that *do* meet the basic requirements for reasonable reliance. These studies have been undertaken at the behest of not only the business establishments involved, but also by at least one local government seeking justification to regulate adult facilities. They measure the impact of long-existing exotic dance facilities in: 1) Fulton County, Georgia (also reported in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001)); 2) Charlotte/Mecklenburg County, North Carolina; and 3) Fort Wayne, Indiana. Unlike the Los Angeles 1977 Study, these investigations are based on sound scientific methodologies and the results obtained therefrom are imbued with sufficient trustworthiness so that they can be relied upon for legislative decision-making.

Having laid this foundation, we then address the City of Los Angeles' contention that the findings of the 1977 Study can be applied to the distinct question of the effects of combination-type business, such as Alameda Books and Highland Books.

Finally, we address the policy implications for the secondary effects doctrine raised by our analyses contained herein.

ANALYSIS

I. The Ten Most Frequently Cited Secondary Effects Studies, Including the 1977 Los Angeles Study, Show No Objective Evidence of a Relationship Between a Concentration of Adult Businesses and Negative Secondary Effects.

As we established in our Appendix to the First Amendment Lawyers Association *Amicus Brief* submitted to this Court in *City of Erie v. Pap's A.M.*, studies conducted pursuant to sound methodological principles demonstrate no correlation between the presence of certain adult businesses and the existence of surrounding negative secondary effects (such as increases in the incidence of prostitution and violence). *See*, City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1403 n.3 (2000) (Souter, J., dissenting). *See also*, Brief for First Amendment Lawyers Association as *Amicus Curiae*, 16-23, at App. 1-29.

Following submission of our analysis of these oft-utilized secondary effects studies to this Court, we undertook to expand upon that review, which resulted in a paper submitted to the Annual Meeting of the International Communication Association, 2000, which received a "Top Three Refereed Papers in Communication Law and Policy" award following peer-review. That analysis was then subjected to further peer-review and ultimately published as a paper entitled Governmental Regulation of 'Adult' Businesses through Zoning and Anti-Nudity Ordinances; Debunking the Legal Myth of Negative Secondary Effects, *Paul, et al. Communication Law & Policy, Vol. 6, No. 2, Spring, 2001, pp. 355-391.*

In examining the history of the uses of these studies by municipalities, we found a consistent tendency to incorrectly assume that these studies, as a group, showed evidence of problems attributed to adult facilities. Municipalities tended to inappropriately equate the simple fact that a "study" had been undertaken with positive evidence of a relationship between adult businesses and negative secondary effects in a community. Most municipalities never considered the methodological validity of these studies, nor did they even appear to have critically examined the studies in order to determine their true findings. In fact, two of the ten "studies" most frequently cited by government bodies in regard to regulating adult businesses (Detroit, MI and Beaumont, TX) were not empirical data collection efforts at all, or even testimony from citizens, but merely reports discussing recommendations concerning the regulation of adult uses. *Paul, et al.*, at 386.

According to our previous analyses, the 1977 Los Angeles Study is the third most frequently used study by municipalities as a basis for regulating adult businesses. However, as we have noted, the authors of the 1977 Study themselves actually claimed to find *no* causal relationship between adult businesses and decreases in property values. Further, we identified serious methodological problems associated with the Los Angeles Police Department's investigation of the supposed relationship between adult businesses and certain types of criminal activity. Therefore, we concluded that the 1977 L.A. Study did not offer even the most rudimentary form of scientifically reliable evidence of a relationship between adult uses and any form of negative secondary effect. *Paul, et al.*, at 378-379.

Contrary to our assertions, however, Los Angeles not only believed that their Study found a relationship between the concentration of adult businesses within the Hollywood section of the city and negative secondary effects, but it now contends that it is reasonable to extend the findings of that Study to the question of the effects of individual combination-type businesses, such as Alameda Books and Highland Books.

Obviously, it is important to address the City's contention that the findings of the 1977 Study can be applied to this new question. We address this in **Part V** of the paper.

However, before doing so, we lay a foundation in **Part II** where we first develop a set of threshold issues that should be evaluated in order to determine whether a "secondary effects study" can be reasonably relied upon as a justification for the enactment of laws and regulations; in **Part III** where we then describe in greater detail and in light of these principles, why the Los Angeles Study contains no scientifically reliable evidence of a relationship between even the *existence* of adult businesses and negative secondary effects in the first place; and in **Part IV** where we contrast that study with more recently conducted investigations which – given the employment of sound methodology – we believe then contain reliable results.

II. The Basic Requirements for Reasonable Reliance on Evidence Obtained From a Study of the Secondary Effects of Adult Businesses.

In our appendix to the *Pap's* amicus brief and as contained in our recently published paper, we analyzed

the most frequently cited secondary effects studies in light of a list of criteria that we believed are critical in order for such evidence to meet the standards of scientific reliability as defined by this Court in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). *See, e.g., Paul, et al.*, at 355-391.

Of course, we do not contend here that a municipality cannot rely upon a secondary effects study as a basis for legislation unless and until that report has been found to have met the elastic *Daubert* standard. Rather, we provide criteria for a court to utilize in determining whether a municipality can justifiably rely upon such a study as a basis for enacting regulations of adult entertainment establishments, or in the particular words of this Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), whether a court can constitutionally conclude that a particular study is "reasonably believed to be relevant to the concerns that the municipality meant to address." *Id.* at 51-52.

Succinctly put, we contend that before a municipality can justifiably or reasonably rely upon a particular study as a basis for enacting restrictions on First Amendment freedoms, that study must have at least a modicum of scientific validity (and therefore reliability), and be shown to be relevant to the proposed legislative enactments. However, as we note below, the procedures used to insure scientific validity and reliability do not differ substantially from plain English principles that we intuitively apply to our everyday decision-making.

We have reviewed in our published paper a list of factors derived from the *Daubert* standards. We note there that a municipality need not necessarily be held to

each of those criteria when legislating. *Paul, et al,* at 370-371. We do contend, however, that at least two of the *Daubert* factors: 1) design of the study so that an error rate can be calculated; and 2) adherence to professional standards in using techniques or procedures (most of which are designed to aid in the calculation of an error rate), should be found by courts to be procedural prerequisites in order for municipalities to be able to utilize them as a basis for regulating expression. These factors insure "evidentiary reliability."

Without this reliability, there is no basis to determine whether there is a substantial or important governmental interest involved, whether a specific piece of legislation is "necessary" in order to further that interest, or whether it is "reasonable" for a municipality to rely upon such a study as a basis for enacting legislation. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); *Renton*, 475 U.S. at 51-52.

In a scientific study, the error rate refers to the probability of accepting a result as true, when it is in fact false. It is an indication of the reliability of a finding. *See, Paul,* at 371, for a technical description of how to calculate such a rate. The results of properly conducted surveys, experiments and quasi-experiments are always couched in terms of an error rate. Professional standards that aid in the calculation of an error rate have been devised by scientists in a particular area of inquiry is, consequently, also necessary in order to insure methodological integrity and thus the validity of a study. *See, Paul, et al.*, at 370-372.

Based upon our investigation of the literature and studies both past and recent, we have identified four

methodological criteria that facilitate adherence to professional standards of inquiry that we believe should be considered before a court could conclude that such a report could be reasonably relied upon in order to justify enactment of a certain regulation.

A study of secondary effects should be examined in order to determine whether they answer or violate the following principles:

(1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them answers they wanted to hear?"

These criteria are neither difficult nor cumbersome to apply, nor are they novel in nature. We apply these standards, in an intuitive fashion, when making routine decisions every day. For example, who among us does not ask, when trying to guess the reliability of a new car we are about to purchase: How does the car we are considering compare to a Ford, or a Toyota? If we owned a car from that manufacturer in the past and it broke down, was that a one-time fluke or is this a consistent pattern with this brand? Are we sure we are not trying to convince ourselves that the car is more reliable than it is because the car is fast and is a convertible? Finally, would we listen only to the car sales person about the reliability of the vehicle or would we seek an objective selection of opinions about the car?

A. "Compared to what?"

Crime rates have been shown to be associated with a concentration of various groups of individuals and businesses.[1] Other things being equal, there are apt, for example, to be more crimes in a densely populated urban area than an undeveloped track of land where people, and therefore "targets," are few and far between. Accordingly, the question that should be asked is not whether there is *any* history of crime in the areas surrounding an adult business (since virtually all business establishments where the public congregates, adult and non-adult alike, will demonstrate to some degree this "connection"), but rather whether there is *more* crime in areas surrounding adult facilities than other type of business establishments situated in comparable areas. The same is true for property values and economic blight. An adult business may be placed, for example, in a depressed area pursuant to zoning requirements, but that factor, in-and-of-itself, does not establish that the adult facility somehow *caused or exacerbated* urban blight and the decrease of property values.

Accordingly, in order to insure that accurate and fair comparisons are being considered, a control or

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[1] P. A. Engstad. Environmental Opportunities and the Ecology of Crime: Crime in Canadian Society (1975); D. C. Duffala. Convenience stores, armed robber, and physical environmental features. American Behavioral Scientist, 20: 227-246. (1976). Dennis W. Roncek and M. A. Pravatiner. Additional evidence that taverns enhance nearby crime. Sociology and Social Research, 70; 185-188; Richard Block and Carolyn Block. Space, place, and crime: Hot-spot areas and hot places of liquor-related crime. In Crime and Place, edited by J.E. Eck and D. Weisburd. Vol. 4 of Crime prevention studies. Monsey, New York: Criminal Justice Press.

comparison area must be selected that is truly "equivalent" to the area(s) containing the adult entertainment business(es). We have previously elaborated on the factors that may ensure equivalence and the calculation of an error rate in the test of differences between the adult and control areas. *Paul*, at 373.

B. "Is this just a one-time fluke?"

A sufficient period of elapsed time, ideally both prior to and following the establishment of an adult entertainment business, is necessary when compiling data in order to ensure that the study is not merely detecting an erratic or aberrant pattern of social activity. Generally, the longer the time period under study, the more stable and reliable (and more valid) the estimates of secondary effects.

C. "Is crime measured according to a reliable source?" and "did the city or the police go looking for more crime?"

The crime rate in a secondary effects study must be measured according to the same valid source for all areas considered. Although we describe this concern in detail in *Paul*, at 373-374, it is especially important that the measurement of crime be factually valid and reliable, such as a daily log kept by police of calls for service, or a compilation of the number of actual arrests. In addition, researchers should also acknowledge changes in police surveillance techniques once adult entertainment businesses have been established in a particular community, as well as during the period that a secondary effects study is being undertaken. Obviously,

increased surveillance of an area will have an impact on the amount of crime "detected" by the police.

D. "Did the investigators talk only to people who would give them answers they wanted to hear?"

Survey research, if relevant to the question of adverse secondary effects at all, must be properly conducted. Historically, most such inquiries involve asking real estate professionals, local property owners, law enforcement officers, and/or community residents to *opine* as to the effect that the presence of an adult business would have on a particular community. Less frequently, surveys of citizens' perception of crime and victimization are undertaken. While subjective surveys may provide us with a sense of the general *opinion* of a particular group regarding the impact of adult entertainment businesses on surrounding neighborhood property values or criminal activity, they do not provide sound evidence of a relationship between these businesses and the actual impacts on the surrounding areas.

Even if some survey research may be relevant to the issue at hand, it must be properly conducted in order for the researcher to calculate an error rate. Professional standards do exist for performing methodologically valid social scientific survey research so that it possesses some degree of reliability and trustworthiness. Adherence to these standards is essential if researchers hope to obtain legitimate unbiased survey results. We discuss these in *Paul, et al.*, at 374.

III. The 1997 Los Angeles Study Authors Themselves Claim to Have Found No Evidence of a Causal

Relationship Between Adult Businesses and Decreases in Property Values, and at Best Claim Only an Equivocal Relationship with Crime. More Importantly, this Equivocal Relationship is Based Upon a Flawed Comparison and is Predicated Upon a "Special Policy Study" Undertaken in Order to Ferret Out More Crime. In addition, the Study Does Not Contain the Requisite Attributes to Allow It to be Reasonably Relied Upon.

The 1977 LA Study report is a combination of four separate research endeavors, each of which will be discussed in terms of our threshold questions.

A. The City Planning Department investigating the effects of concentrations of adult businesses on area property values reported that they did *not* find any consistent increase or decrease in property values associated with adult businesses.

In this portion of the Study, the researchers, asking the "compared to what" question, compared changes in property values from 1970-1976 for five "study" areas (those containing concentrations of adult businesses) and four "control" or comparison areas (those containing no such concentrations).

The six-year time span between 1970 and 1976 is significant in that the authors claim it represented a period of substantial increases in the number and concentration of sexually oriented adult businesses in the study areas specifically, as well as throughout the city in general.

The study findings showed little differences between the study and comparison areas.

This lack of difference leads the researchers to state: "On the basis of this comparison, it cannot be concluded that properties containing concentrations of adult entertainment businesses have *directly* influenced the assessed valuations of such properties."[2] It is interesting to note that the authors of the study underlined the word "directly." The authors may have wished their readers to "read between the lines" and conclude that they may have found evidence of an "*indirect*" influence of adult business concentrations on property values. Yet, no such evidence is offered anywhere within the study.

And, while there are procedural problems with this portion of the study many aspects of it actually show *higher* property values in the adult areas than the non-adult control areas (one set showing a 400 percent greater increase). Such findings are directly opposite to the assumption that these studies (and in particular the 1977 LA Study) stand for the proposition that the existence of adult businesses, or at least a concentration thereof, reduce property values and increase urban blight.

Although containing some methodological flaws, this first study represents the strongest (most methodologically sound and therefore most reliable) of the four sections of the report from a scientific perspective. Yet, the results suggest that no such relationship between a concentration of adult uses and secondary effects exists.

B. The second part of the 1977 LA Study claims to have found that *public opinion* is strongly opposed to the operation of adult businesses. Yet, such a

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[2] 1977 LA study at 2 (emphasis in original).

"study," even if performed correctly, does little more than attempt to gauge subjective opinions. It does not answer the question of whether adult businesses *cause* adverse secondary effects. And, in any event, the public opinion polling undertaken by the City does not meet the professional standards for performing methodologically valid, reliable and trustworthy social scientific survey research.

We will leave it to others -- the lawyers -- to discuss the question of whether public opinion, even if appropriately and accurately measured, can ever serve as the basis of the suppression and/or regulation of speech and expression related activities. However, even if public opinion were to have some relevance to a secondary effects analysis, our review of this portion of the 1977 LA Study leads us to conclude that any results would be of little to no scientific relevance because of the methodologies used.

Two versions of a survey were administered in this part of the study to determine public opinion concerning adult businesses. The first survey was given to residents and property owners who lived and/or worked within 500 feet of any of the five study areas. This survey yielded a return of only 581 of the 3600 questionnaires, or a 16 percent rate. A separate survey was sent to all of the members of the American Institute of Real Estate Appraisers having a Los Angeles address and also to members of the California Association of Realtors whose offices were located in the vicinity of the study areas (retained from the first section of the report). Only 81 of the 400 questionnaires (or 20 percent of those sent out) were returned.

In both cases, the response rates of these surveys fall well below the acceptable professional standards (a

professional rule of thumb is that a response rate of 50 percent is adequate for analysis and reporting; a response rate of 60 percent is good; and, a response rate of 70-75 percent is very good).[3]

Low response rates such as those in the 1977 Los Angeles Study indicate the presence of a high response bias. In other words, the City may have only heard from people who were motivated to complain about the presence of adult businesses and used the questionnaire to voice their opinion.

Compounding the bias even further, a large portion of the residents and property owners who returned questionnaires were given the questionnaires at two town meetings held to discuss the "problem" of adult businesses.[4]

In the end, such a collection of respondents is surely not a randomly chosen sample from the population of people who reside near adult businesses, with each person having an equal chance of being chosen for the study. Without obtaining a random sample of respondents from the community, the study authors cannot calculate an error rate and, as such, the reliability of any of their findings cannot be determined. And, here, the survey appears to have been conducted in a gerrymandered fashion in order to obtain the desired results.

In summary, the researchers (the City Planning Department) failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques.

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[3] See Earl Babbie, The Basics of Social Research 240 (1999).
[4] 1977 LA study, at 32 n.4

Finally, even if the opinion poll had been conducted in a scientifically sound manner, the research reported in this section does not answer the question of whether concentrations of adult businesses *cause* adverse secondary effects.

Survey opinions cannot replace the evidence supplied by objective comparisons of (for example) property values and/or crime statistics compiled within areas containing adult entertainment businesses, with those garnered from areas containing no such businesses.

C. The third section of the report discusses the results from a 1974 "cluster" analysis performed by the City of Los Angeles Community Analysis Bureau (CAB). However, the City's own analysis for the Hollywood area belies the idea that crime is higher near adult businesses. For other geographical areas, study and control area sites were so incomparable on several key population and economic characteristics as to invalidate legitimate crime comparisons.

This section of the report attempts to determine if the presence of adult businesses is related to criminal activity by comparing areas with adult businesses to areas that did not contain such businesses. The CAB's "cluster" analysis entailed grouping each of the City of Los Angeles's 750 census tracts (the smallest geographical area for which information of residents is collected on a regular basis) into a smaller set of 30 "clusters," or combinations of tracts.

To accomplish this "clustering," the CAB examined each census tract on 66 census variables that

they had deemed to be the most accurate descriptors of the tracts. Importantly, five of the variables used by the CAB to group the tracts into clusters were crime variables. These included: the number of assaults per 100 population, robberies per 100 population, burglary per 100 improved parcels, total arrests per 100 population and narcotic arrests per 100 population aged 14 – 44.[5]

The clusters were also grouped by real estate value variables such as approximate median value of owner occupied units and approximate median monthly rent of renter occupied units.

The authors then statistically compared these clusters that encompassed the adult and comparison areas (three adult areas and three control areas were compared in the Hollywood region of Los Angeles and two adult areas in the North Hollywood and Studio City region were compared to one control area in the San Fernando Valley).

It should be noted that at this point something extraordinary was found. The study authors admit that all of the tracts that were included in the Hollywood adult business areas *and* in the control condition areas were, statistically speaking, identical to each other. The importance of this finding cannot be overstated. It establishes that when undertaking precisely the statistical test that would most reliably yield knowledge of whether the Hollywood census tracts containing adult businesses have higher rates of crime than comparable tracts that do not contain adult businesses, no such higher rates were found.

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[5] 1977 LA study, at 44 n.4, 49.

According to this test, then, performed by the City itself, the adult business areas and control areas were more similar to each other, in terms of crime, than they were to any other region of the city. In other words, despite the concentration of adult businesses operating within the study areas in Hollywood, those areas with adult businesses were actually more similar to the control areas than they were to other areas in the city.[6]

These findings are *exactly contrary* to what would be expected if there was a connection between adult businesses in Hollywood and the adverse secondary effects of increased crime and decreased property values.

The other two adult business areas (North Hollywood and Studio City) and the one remaining comparison area fell across eight separate census tracts that each fell into one of six different clusters. The implication here is that these adult and comparison areas were actually poorly matched. Specifically, the study and control areas were significantly disparate on several key population and economic characteristics that could influence both crime rates and real estate values (irrespective of the presence of an adult facility). Any differences found between them regarding crime rates or property values is more than likely the result of one or more factors normally associated with criminal activity, rather than the presence or absence of adult businesses.

Nonetheless, regardless of these substantial problems in matching study and control areas, or perhaps because of them, no reliable pattern of differences on the crime rate variables could be found

[6] 1977 LA study, at 45-46 n.4.

between and the areas with concentrations of adult entertainment businesses and those without such concentrations.

For example, the number of assaults per 100 persons in the population was *lower* in the adult business area clusters (.46 and .37) than the control area clusters (.48). The robbery rate for one of the study area cluster groups (.17) was *equal* to that for the control area clusters (.17), while the other study area cluster groups were found to have a higher robbery rate (.267) than the control. Burglaries per 100 improved parcels were found to be *substantially lower* than the control area clusters (13.50) for one of the adult area cluster groups (10.94) and slightly higher for the other (13.86). Total arrests per 100 persons in the population were found for both of the study area clusters to have an insignificantly higher rate (4.2 & 4.2) than the control area (4.1). Narcotics arrests per 100 persons in the population were found to be *lower* for the North Hollywood study area cluster groups than the San Fernando Valley control clusters (1.6), but higher for the Studio City study cluster groups (2.66).

Taken as a whole, then, we may note that out of the ten comparisons made between the adult and control areas on crime statistics reported for the Studio City and North Hollywood regions (utilizing these ill-matched areas for comparison purposes), four found higher crime rates in control (non-adult) area clusters, one found no differences between study and control area clusters, and five demonstrated higher crime rates in the adult area clusters. These findings provide no evidence of an actual relationship between the concentration of adult entertainment businesses and the negative secondary effect of increased crime.

The findings in this section represent the results of the most scientifically sound examination of the relationship between concentrations of adult businesses and criminal activity offered in the entire 1977 LA Study. Only in this section of the report does the City attempt to compare criminal activity in areas containing concentrations of adult businesses (study areas) with properly matched comparison areas containing no such concentrations.

Having found, however, no reliable evidence of differences in crime or property value decreases in areas containing adult businesses, the City then turned to a "special" police study of the Hollywood area.

D. The final section of the Los Angeles Study report focuses on the results of a "special" police department study that was intended to compare the occurrence of certain types of criminal activity in the Hollywood area with the rate of such activity throughout the rest of the city. The first problem with this "study" is that the police admit to stepped-up police surveillance in the Hollywood area between 1969 and 1975, but admit there was no such surveillance increase for the rest of the city.

Unlike the other three sections of the report, the study reported on in this section was not undertaken by the City Planning Department, but by the Los Angeles Police Department (LAPD). The basic finding of this portion or the report provides the opinion and "conclusion" that because crime is higher in the Hollywood area than in other portions of Los Angeles, and because Hollywood had a greater concentration of adult businesses than the remainder of the City, that the increased incident's of crime in Hollywood are directly related to the presence of adult entertainment facilities.

The first and most substantial problem with this study is that LAPD freely admitted that they had stepped-up surveillance efforts in Hollywood in 1975 during the period they were compiling the criminal activity counts that were later compared to earlier 1969 figures. No such increase in surveillance efforts was reported for the Hollywood region in 1969 or for the rest of the city in either 1969 or 1975. Further, the LAPD reported a 31% increase in the combined number of patrol officers and criminal investigators assigned to the Hollywood area compared to an increase of only two thirds that size in the remainder of the city.

It is likely that the greater increase in certain types of criminal activity between 1969 and 1975 was found by the police in the Hollywood region when compared to the rest of the city because there was an increase in the number of officers looking harder for crime in Hollywood.

The incomparable increases in the number of officers and the stepped-up intensity of surveillance efforts in the Hollywood region render any findings from this section of the 1977 Los Angeles study unreliable according to any scientific criteria.

E. The second problem with the "special" police study is that it compares the occurrence of criminal activity in the Hollywood area *generally* with the rate of such activity throughout the remainder of Los Angeles. The authors incorrectly infer that because there may be a difference in crime rates between these two geographic regions, that this proves that adult businesses were the cause of the difference. This inference is a logical error known as the "Ecological Fallacy."

The City's interpretation of the results from the "special" police study falls prey to a common logical error in reasoning about research findings known as the "Ecological Fallacy." The fallacy is to assume that something learned about a unit in general says something about the individuals making up that unit.

For example, consider a finding that voting precincts (the ecological unit) with larger percentages of women (individuals) voted, on average, for the Republican candidate in an election. Although we may be tempted to do so, we cannot conclude that women in the precinct were more likely than men to have voted for the Republican candidate, since we have only information collected at the level of precinct, not at the level of the individual voter. Perhaps, the women's vote was more or less "split" while the men in each precinct voted overwhelming for the Republican candidate.

Similarly, we cannot assume that a higher crime rate in Hollywood is due to adult businesses unless we collect information that links crime to the adult businesses *per se* rather than only measuring crime in Hollywood generally and then comparing it to the rest of LA.

The City of Los Angeles commits the Ecological Fallacy in its 1977 Study when, upon finding a difference between the crime rates in the Hollywood area and the rest of the city, it assumes -- *out of an almost infinite list of variables* -- that this difference is due specifically to the concentration of adult businesses in Hollywood, when the researchers did not measure the actual impact of such businesses in Hollywood at all. Simply comparing the crime rates in the entire Hollywood area

(regardless of whether such crime occurred on or near an adult business property) with the remainder of the city as a whole is an invalid method of attempting to determine whether the increase of crime in the Hollywood area is somehow associated with adult establishments.

F. Summary and implications.

We have illustrated above that not only are there significant methodological flaws in the manner in which the four portions of the 1977 Los Angeles Study were conducted, but that, more importantly, there are no true findings contained in that report which could allow any reasonable social scientist to conclude that adult entertainment facilities were somehow connected to increase in crime and decreases in surrounding property values. More importantly, there are no findings in that Study, direct, indirect, or even implied, justifying the necessity for precluding "multiple use" establishments or providing any support whatsoever for the proposition that such a regulation would serve to reduce or ameliorate such secondary effects.

IV. There Are Studies That Pass the Threshold Questions: (1) "Compared to What?" (2) "Is This Just a One-time Fluke?" (3) "Is Crime Measured According to a Reliable Source?" and "Did the Government Go About Looking for More Crime to Justify its Legislation?" (4) "Did the Investigators Talk Only to People Who Would Give Them the Answers They Wanted to Hear?" These Studies Have Found No Evidence of Adverse Secondary Effects for Adult Businesses and Exotic Dance Establishments.

After having analyzed the prior secondary effects studies, and in particular the 1977 Los Angeles Study,

and having made certain statements concerning the proper methodology that should be utilized in any such investigation in order to be confident that there is even a modicum of trustworthiness in the results obtained, we now undertake an analysis of more recently conducted evaluations of the supposed nexus between adult business establishments and perceived adverse secondary effects. Unlike the LA 1977 Study, the studies described below have attempted to adhere to appropriate methodological concerns so as not to violate the fundamental scientific, methodological and common sense principles discussed above.[7]

These studies, some of which were conducted at the behest of adult business owners but others which were commissioned by the applicable governmental unit, fail to establish any relationship between the operation of adult entertainment businesses (at least those in the form of establishments that present live nude, "topless" or "pasties and g-string" dance entertainment) and negative secondary effects; they offer the highest degree of evidentiary reliability of any preexisting secondary effects studies to date; and they certainly lend evidentiary credence to the underlying proposition of this paper--that being that courts should not accept the mere recitation of a supposed "secondary effects study," without specific analysis thereof, in order to justify regulation and in some instances prohibition of speech and expression related activities.

Overwhelmingly, these studies demonstrate that when proper methodology is employed, and the threshold questions transcended, there are no

[7] Pursuant to instructions of the Clerk of this Court, copies of the materials referenced in this section of this paper have been lodged with the Court.

demonstrable adverse secondary effects of adult entertainment establishments in the form of crime, reduction of property values, and urban blight.

A. The Fulton County Studies.

These studies are reported in *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). On June 13, 1997, the Fulton County Police Department completed a study concerning the number of calls for police assistance and the number of types of crimes occurring in the vicinity of twelve drinking establishments; six that featured adult entertainment and six that did not. This study meets the methodological criteria that we discuss in this paper. The study concluded that, for the time period January 1, 1995 through May 31, 1997, there was *no statistical correlation* of an increase in crime at adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated *greater* instances and calls for service and reported crime at *non*-adult entertainment establishments that served alcoholic beverages.

The methodological features of this investigation conform closely with several of the scientific principles and common sense rules we apply here to determine if a finding can be trusted. First, crime was measured according to a reliable source--the number of calls for police assistance recorded by computer and compiled by the police objectively, on a daily basis. Second, there was no "stepped up police surveillance" that could inflate crime measurements. A comparison was made between crime rates surrounding the adult establishments and crime surrounding comparable business establishments—answering the "compared to

what" question. And, finally, a sufficient time period, 30 months of calls for service, was utilized to avoid capitalizing on a "one-time fluke" in criminal activity.

In addition, an economic impact study was conducted in 1997. Six Fulton County adult entertainment establishments commissioned Land Development Analysts, Inc. to conduct a study of the clubs' economic impact on their surrounding environs. This study sought to identify negative impacts, if any, on the business volumes, rental rates and property values of surrounding properties. The study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volumes and proposed development in the vicinity of the studied adult clubs. The investigation found no detrimental impacts as caused by the adult facilities.

In response, the County Board of Commissioners had the study peer-reviewed. The Board retained its own appraiser to inspect the subject properties and to review the economic impact study. The appraiser hired by the Board certified that the clubs had gathered the appropriate data and drew appropriate conclusions.

B. Charlotte/Mecklenburg County North Carolina Studies.

Two studies, a property value appreciation study and a crime study, were undertaken in 2001 in the Charlotte/Mecklenburg County, North Carolina, area. As with the Fulton County studies, these investigations utilize the scientific principles and common sense rules outlined above.

The Property Values Study (*See*, "Measuring secondary effects using spatio-temporal estimation of real estate price appreciation," George W. McCarthy and Henry Renski, University of North Carolina at Chapel Hill, 5/24/01) made use of the entire tax appraisal database for Mecklenburg County, which lists all properties and the last two sales prices of the properties (approximately 600,000 properties). The authors only used houses that were sold twice between 1980 and 1999 (approx. 65,000 properties). Methods were used to determine how far the properties were from the 20 adult dance clubs in the county. The authors then compared annual real estate appreciation rates near clubs versus not near clubs in Mecklenburg County.

The findings indicated that examining performance over time, housing near adult establishments appreciated at least as fast or faster in 11 of twenty years.

Using 1980-2000 tax assessment data from Mecklenburg County, North Carolina, the authors estimated annual appreciation rates and evaluated the extent to which appreciation rates are related to the location of adult clubs. The study showed that there was no evidence that negative secondary effects on house price appreciation can be found in two decades of housing transactions in Mecklenburg County. In fact, the authors note that their interpretation may be too conservative:

> "The results of the study are consistent with the empirical results of the oft-cited studies of negative secondary effects discussed above. In almost every study discussed, the secondary effects

associated with adult establishments are inconclusive. However, this is a rather conservative reading of the results. One might make the argument that there is evidence from the other studies, evidence that is validated in this study, that there are *positive* secondary effects associated with proximity to adult establishments. While the existence of positive secondary effects might seem an absurd claim, an argument might be made that the location of adult establishments is non-random.

The non-randomness might be associated with the same non-randomness that leads to the location of other undesirable activities (for example, junkyards, mobile home parks, other noisy or dirty production activities) to areas with inexpensive properties. Low priced properties might provide higher than average returns, especially as urban sprawl or development limits make the areas more desirable development locations" (pg. 20).

The Charlotte Crime Study (*see*, "Are Adult Dance Clubs Associated with Increases in Crime in Surrounding Areas? A Secondary Crime Effects Study in Charlotte, North Carolina," May 18, 2001, Kenneth C. Land, Jay R. Williams, and Michael E. Ezell, Duke University) tested the hypothesis that the presence of an adult nightclub increases the number of crime incidents reported in localized areas.

Appropriate methodology was utilized to select suitable control (non-adult nightclub) sites that were comparable (matched) to the study (adult nightclub) sites on key demographic and other variables that are generally regarded as being related to the incidence of crime.

With support from the United States Department of Justice Office of Community Oriented Policing Services, the Charlotte-Mecklenburg Police Department maintains a computerized reported incidents information system for the city of Charlotte and Mecklenburg County, North Carolina, that permits the easy collection of data concerning all crime incidents reported at or near each of the adult nightclubs and control sites for the three years 1998 through 2000. This information served as the basis of the report.

The authors grouped the reported crime incidents into six categories, ordered from the most to the least inclusive as follows: Total crimes; total Uniform Crime Reports Index Crimes; total Uniform Crime Reports Violent Crime Index Crimes (murder, rape, aggravated assault, robbery); total Uniform Crime Reports Property Crime Index Crimes (burglary, larceny-theft, motor vehicle theft, arson); sex crimes; and all other crimes.

The results revealed that with respect to *all six categories* of crime incidents under investigation, the overall mean numbers of crime incidents for all three years combined are *substantially less* in the areas surrounding the adult nightclubs than in the areas surrounding the control (non-adult) sites.

C. The Fort Wayne Study.

An empirical study of criminal activity surrounding exotic dance nightclubs in Fort Wayne, Indiana, was undertaken in 2000 by the authors.[8]

As with the Charlotte/Mecklenburg and the Fulton County studies, this examination of the supposed adverse effects of so- called "adult" establishments also adheres to the requirements set out by this Court in *Daubert* for the proper conduct of a social scientific inquiry.

A 1000 feet circumference surrounding each of eight exotic dance nightclubs in Fort Wayne was established. Comparison areas were selected in the city and matched to the club areas on the basis of demographic features known to be related to crime and also matched on the basis of commercial property composition.

Information on calls to the police for service (many of which ended in arrest) for the three-year period of 1997-2000, was obtained. Only crimes presumed to be related to exotic dance establishments were included in our examination. These included: 1) Sex crimes (rape, molestation, indecent exposure, sexual battery); 2) aggression related non-sexual

[8] The Ft. Wayne clubs studied do not operate in a form of what is traditionally considered to be an "adult" entertainment business. The entertainers at these establishments perform wearing "pasties" and "g-strings" consistent with Indiana statute and this Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). For this reason, while we refer to previous reports and studies as attempting to analyze the relationship of "adverse secondary effects" and "adult" businesses, we generally refer to the studied facilities here either as "nightclubs" or "exotic dance" establishments.

offenses (shootings, fights, non-sexual battery, disturbances); and 3) thefts, burglaries and robberies.

The number of calls to the police and arrests in the areas surrounding the exotic dance nightclubs was then compared to the number of crimes found in the matched comparison areas. The analysis showed little difference, overall, between the total number of calls to the police reported in the areas containing the exotic dance nightclubs and the total number of offenses reported in the comparison areas. For sex crimes (presumed to be especially likely to be related to exotic dance entertainment establishments) such as rape, molestation, indecent exposure and sexual battery, the overall number of crimes was nearly identical in the areas surrounding the exotic dance nightclubs and the comparison areas. The same pattern of similar crime levels in the club and comparison areas held for thefts, burglaries and robberies. However, for aggression-related, nonsexual offenses, the club areas actually had *only one half* as many calls for service as the comparison areas.

We concluded that there was no empirical evidence of the existence of adverse secondary effects, in the form of crime, surrounding exotic dance businesses in Fort Wayne. Any assumption that such effects existed and that this city should regulate such establishments on the basis of such "adverse secondary effects" was therefore, we contended, not substantiated by that study.

In summary, the findings from the Fulton County, Charlotte/Mecklenburg and Fort Wayne investigations, unlike most of the previously cited secondary effects studies (including the Los Angeles 1977 Study) are

empirically reliable because they apply scientific and common sense principles. Our analyses of these studies suggest that when proper methodology is employed, there are few if any adverse secondary effects found as being associated with adult establishments. In fact, these studies suggest, as did the governmentally prepared St. Paul, Minnesota (1978) study (discussed in detail in *Paul, et al.*, at 375, as being the only methodologically sound investigation among the ten most frequently cited studies), that there is more crime and neighborhood deterioration in other areas of the community, especially where alcohol is served in a non-adult entertainment setting -- than in the areas immediately surrounding adult nightclubs.

Now, in light of these observations, we address the immediate question before the Court.

V. Even if the Los Angles 1977 Study Had Found Evidence of Adverse Secondary Effects Generally, Such findings Would Not Provide Any Information as to Whether "Combination" Uses Engender Particularized Problems That Would be Specifically Addressed by a General "Dispersal" Zoning Ordinance. The Question of When Study Findings can be Generalized to Another Time, a Different Place, or Other People is ultimately an Empirical One.

The fundamental question under consideration by this Court is: Assuming that the 1977 LA Study *had* established evidence of the existence of secondary effects associated with the concentration of adult businesses, can that information be utilized to justify a law prohibiting the establishment of "adult" "combined" or "mixed" uses?

We conclude, as the Ninth Circuit did, that such an extension is unwarranted and that these limited "findings" provide no basis or justification –whether empirical, intuitive or otherwise –for the zoning provisions under review. In scientific terms, the Circuit Court was grappling with the question of when it is appropriate to "generalize" the findings of an empirical investigation to circumstances other than those originally studied.

A. When is it unreasonable to generalize study findings from one situation to another?

In science, "generalizability" is defined as the quality of a research finding which justifies the inference that it represents something more than the specific observations upon which it is based.

As the present case illustrates, generalizing a research finding beyond the specific observations on which it is based can include multiple considerations. Sometimes it is a matter of seeking similarities between the "character' of the original units studied and the new units to which we wish to generalize. Other times, it may be a matter of frequency of presentation of, for example, adult material as in equating the single showing of a film with the harmful effects assumed to occur with businesses devoted to adult fare. *See, e.g., Tollis v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987).

More broadly, sometimes generalizability it is a matter of similarity of concepts: If you discover why people commit burglaries, can you generalize that discovery to other crimes as well?[9] Often, it involves the

[9] Earl Babbie, supra, at 215 n.8.

generalization of findings from a sample to a population. We cannot generalize our findings to other populations because we did not take a random sample from the population (we sampled males and we wish to generalize to females, or we sampled older people and we wish to generalize to younger people in the population).

Other times, we cannot generalize because of the methods we empl y to study a phenomenon. If we have measured a phenomenon at a certain level, or chosen a certain "unit of analysis," our findings may not apply well to other units we may wish to consider. Here, our example of the Ecological Fallacy from the "special police study" of the 1977 Los Angeles Study above applies. It is logically impossible to conclude anyth ing about the impact of the concentration of adult businesses in Hollywood when measurements of crime have been taken only at the level of the entire community.

B. Whether the results of a study can be generalized to other times, locations, situations or other persons is an empirical question.

As can be seen from these examples, there is no "magic formula" for determining when a study is generalizable. Instead, social scientists, when confronted with important social policy questions, have come to rely on additional empirical investigations when in doubt about a study's general applicability. An additional investigation is often the only way to insure against improperly extrapolating findings. Thus, whether or not one is able to generalize across people, places, or methodologies may ultimately be an empirical question. Sometimes, only an additional study can tell us how far

a specific set of observations, made earlier, may be extended.

C. Los Angeles should have first empirically determined if it's original zoning legislation was effective before implementing another, more restrictive, set of regulations.

The evidence Los Angeles has relied upon here -- the 1977 Study -- contained no empirical evidence that addresses the specific question of whether an individual combination bookstore/arcade produces any of the increased crime the original study (allegedly) found resulting from a concentration of adult businesses. Nor was any analysis undertaken of the effect upon supposed adverse secondary effects by the enactment of the original "dispersal" zoning provisions which were themselves predicated upon the findings of the 1977 Los Angeles Study itself.

If we assume that the dispersal requirement was meant to ameliorate supposed secondary effects associated with adult businesses, we must also then logically assume that following the enactment of those provisions (which clearly pre-dated the "multiple use" regulations at issue here), whatever secondary effects may have existed would have been significantly reduced or abrogated altogether.

The question then remains, and it is clearly an empirical one, of what secondary effects, if any, exist *after* the enactment of a specific regulation meant to address those problems. If we do not ask that question, we invite the never-ending enactment of yet more and more (and ever more onerous) restrictions without ever examining whether there are any problems left to be

addressed following the enactment of a law meant to correct such problems.

Here, mere reference to the 1977 Los Angeles Study tells us nothing objectively about what secondary effects may remain once the dispersal regulations were enacted in an effort to address those problems. In addition, in the absence of *any* empirical evidence – old, new or otherwise -- of the adverse effects associated with these combination adult uses, it is unreasonable, we contend, for any court to permit a governmental unit to infer or conclude that absent additional regulations, a bookstore/arcade combination would have harmful secondary effects.

Here, Ninth Circuit was faced with the question of whether the government may restrict to selected locations, mixed uses adult businesses on the sole basis of the results of the 1977 Los Angeles Study. In our opinion, that court was correct in asserting that it was not reasonable to rely on that study as justification for these restrictions, first, because that study does not objectively demonstrate any clear adverse effects and, second, even if such effects were reliably shown, it is not readily apparent that they may be generalized to the new question about mixed use businesses *after* the enactment of a general dispersal ordinance.

VI. The Policy Implications for the Secondary Effects Doctrine.

As we have shown above, legislative bodies and courts are now confronted with methodologically sound studies that fail to demonstrate a connection between the existence of adult businesses and negative secondary effects. They are also faced with the

submission of the older-type studies, many "conducted" between twenty to thirty years ago which in some circumstances were not "studies" at all, in other circumstances demonstrated either no connection between adult uses and secondary effects or even an *inverse* connection, in many cases dealt with types of businesses that no longer even exist (adult movie theaters), in virtually all circumstances were undertaken *before* the enactment of specific regulations meant to alleviate those perceived problems, and which by-and-large were not undertaken utilizing even the most rudimentary methodological constraints in an effort to insure validity of the results.

Given the state of contradicting empirical evidence that will be faced by legislative bodies and courts in the future, guidelines may be welcomed to establish under what circumstances the assertion of secondary effects may be utilized as a justification for regulations upon speech and expression related activities. We assert that two sets of inquiries (A and B below) should be made when examining purported evidence that is submitted in an effort to justify or challenge the enactment of such a regulation.

A. Any particular study of secondary effects should be examined in order to determine whether it answers the following questions or violate the following principles: (1) "Compared to what?" (2) "Is this just a one-time fluke?" (3) "Is crime measured according to a reliable source?" and "did the government go about looking for more crime to justify its legislation?" and (4) "Did the investigators talk only to people who would give them the answers they wanted to hear?"

While a local legislative body may not be held to these standards, certainly a court may find it useful to ask these questions in order to determine whether purported supporting evidence for a legislative enactment could be reasonably relied upon. In evaluating the vitality, and indeed validity, or purported "evidence," courts may best be served by turning to the standards we have laid out. Such an analysis would allow courts to separate "the wheat from the chaff," and the truth from the "junk science."

B. If there is a question as to whether a study is being applied more broadly than originally intended, or is being utilized to justify successive laws following enactment of regulations meant to address perceived problems noted in the study itself, a new empirical investigation is often warranted.

It should be axiomatic that the fundamental obligation of a court should be to seek the truth. Here, and in future cases, the question must be asked as to whether, at a certain point of time and in a certain set of circumstances (particularly, in light of already-existing regulations), there exists such evidence that can be *reasonably* relied upon establishing that certain types of adult uses engender some forms of secondary effects so as to warrant the enactment of additional laws?

Justice Souter stated in *Pap's* that cities interested in regulating adult activities on the basis of secondary effects should be required to provide germane evidence of a relationship between the expressive activity and secondary effects. 120 S. Ct. 1382 at 1403-04 (Souter, J., concurring in part and dissenting in part). This case and -- in light of the evidence that we have discussed -- cases that will be adjudicated in the

future where the courts will be required pursuant to *Pap's* to evaluate both the "old" and these "new" studies in the secondary effects calculus in order to determine the validity of a particular regulation, well illustrate why this burden should be demanded.

As we have stated, whether findings from a study conducted for one purpose can be applied to another situation is often an empirical question. Common problems occur with generalization to circumstances, people, situations, and time periods other than those originally studied. Unless the question of whether particular findings are empirically relevant to new situations is addressed through scientifically valid empirical research, the secondary effects doctrine will be viewed as a theory not grounded upon an inquiry of truth, but merely as a theoretical (and unsubstantiated) basis to regulate and in some circumstances ban what some may consider to be undesirable expression.

To not undertake additional empirical inquiry is to make it permissible for governments to continue to regulate today on the basis of a study conducted 25 years ago, and undertaken prior to the enactment of other regulations meant to address the perceived problems of secondary effects. In addition, given the nature of some of these previous studies, reliance upon them makes it permissible to regulate on the basis of the opinions of, for example, a group of vocal real estate board members, sampled improperly, whose opinions cannot be extrapolated or generalized to an entire community. Without additional or new empirical investigations, properly conducted, there is nothing to prevent government from using *any* supposed finding from *any* "study" to justify *any* regulation, no matter how

broadly or unreasonably the findings may be extrapolated.

Collection of empirical information is now not overly difficult or expensive. The Fulton County police collected their evidence easily. Such evidence is now at most municipalities' fingertips in the form of calls for service to the police that are routinely computerized and logged. Property value data is in most circumstances easily obtained from real estate databases designed to track these sales for tax purposes. Certainly, there should be nothing feared in regard to investigation as to the true effects that certain adult businesses may have upon specific municipalities, particularly in light of previous (and now long-standing) regulations -- such as zoning dispersal requirements and anti-nudity provisions -- that were enacted with the specific intent to ameliorate such secondary effects.

In *Pap's*, Justice O'Connor and the plurality provided room for challenges, based on the collection of empirical evidence, to assertions made by municipalities regarding a relationship between adverse secondary effects and adult establishments. The plurality noted that the adult business in question in *Pap's* could have challenged the City of Erie's assertion that nudity led to ill effects but did not do so. This leaves room for the introduction of additional secondary effects evidence both in city council hearings and as a basis for court litigation. When courts are faced with these conflicting assertions of secondary effects, they should utilize the tools that we have suggested herein in order to be able to determine truth and reject fiction and innuendo.

Dr. Daniel Linz, Ph.D.
Bryant Paul, MS

JEFFERSONVILLE, INDIANA

Ordinance 95-OR-35
An Ordinance Establishing Regulations for the Operation of Live Adult Entertainment Businesses

[EXCERPTS]

Whereas, the policy of the State of Indiana is to grant Cities and Towns all the powers that they need for the effective operation of local government as to local affairs. Indiana Code 36-1-3-2;

Whereas, the law of the State of Indiana provides that Cities and Towns have all powers granted it by statute, all other powers necessary or desirable in the conduct of its affairs, even if not granted by statute;

Whereas, the City of Jeffersonville has the power to protect the public health, lives and property of its citizens;

Whereas, in order to protect the public health, lives and property of its citizens, the City of Jeffersonville has the authority to impose licensing fees which are reasonably related to the administrative cost of issuance of the license, inspecting and regulating the operation of live Adult Entertainment Businesses;

Wherefore, in order to regulate the operation of those businesses described herein, it is necessary to assess licensing fees upon both the businesses and the entertainers.

* * *

F. Live Adult Entertainment: "Live Adult Entertainment" means:

(1) any live performance which the average person, applying contemporary community standards, finds that the dominant theme of the performance, take as a whole, appeals to the basic interest in sex.

(2) any live performance wherein the matter of the performance depicts or describes, in a patently offensive way, sexual conduct.

(3) any live performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(4) any live performance wherein the participant appears in a state of "nudity."

(5) any business wherein its employees, sub-contractors, independent contractors, or any individual who performs any service upon the premises who receives a salary, wages, tips, gratuities or other remuneration either from the patrons of the business or from the owner, operator, his assigns, partners, employees or other agent, wherein said employee, sub-contractor, or individual performs said service in a state of "nudity."

G. Live Adult Entertainment Business: "Live Adult Entertainment Business" means any business within

the City of Jeffersonville wherein those activities as defined in section "F" above are conducted for profit.

H. Adult Entertainer: "Adult Entertainer" is any individual who engages in conduct as defined in section "F" above who receives a salary, wages, tips, gratuities or other remuneration either from patrons of a business or from the owner operator his assigns, partners, employees or agents for services performances as defined in section "F."

* * *

II. Licensing of Adult Entertainment Businesses

Owner's Licensing: Any person who owns a building or structure which is to be utilized as a place for live adult entertainment shall apply in writing to the office of the Jeffersonville Building Commissioner, upon a form to be furnished by the Jeffersonville Building Commissioner. That the form shall require the following information as well as any and all other information deemed appropriate by the "Adult Entertainment Commission" (hereinafter AEC):

A. The name, address, telephone number, social security number and date of birth of the owner. If the owner is a corporation, partnership or other business entity the applicant must provide the above information for all of those principals in said business entity.

B. If the owner is a corporation the applicant must provide a copy of the corporation's articles of incorporation. Moreover, the

applicant must provide proof that the corporation has no outstanding corporate taxes, both Federal and State, outstanding.

C. The applicant must provide proof that all property taxes upon the structure or building are current and provide certified acknowledgment that no liens have been placed against said building or structure for municipal services such as sewage, water and/or other services provided.

D. The names, address and telephone numbers of any and all other live adult entertainment businesses which the owner is a partner, employee, stock-holder, sole proprietor or has any affiliation or association as either an owner or operator.

F. The applicant must provide written statements from not less than three (3) bona fide residents of the City of Jeffersonville setting forth the applicant is of good moral character.

2. Owner's Licensing Fee: That the completed application shall be accompanied by a certified check made payable to the City of Jeffersonville in the amount of Ten Thousand Dollars ($10,000). The check shall be placed in escrow pending determination of the applicant's fitness for licensure.

A) If it is determined by the AEC that the Owner is suitable for licensure, the full amount of Ten Thousand Dollars ($10,000) shall be transferred to the City's general fund;

B) If the AEC denies the owner's application the City shall return Five Thousand Dollars ($5,000) of the fee to the owner. The remaining Five Thousand Dollars (5,000) shall be transferred to the City's general fund for the purpose of off-setting administrative and regulatory costs;

C) The Owner's license shall be displayed at all times in a public place visible. The failure to display this license in a public place shall result in a Two Thousand Five Hundred Dollar ($2,500) fine.

3. Operator's License: Any person who shall serve as the operator of a place for live adult entertainment shall apply in writing to the office of the Jeffersonville Building Commissioner, upon a form to be furnished by the Jeffersonville Building Commissioner. The form shall require the following information as well as any and all other information deemed appropriate by the AEC:

A) The name, address, telephone number, social security number and date of birth of the operator.

B) The operator's pervious address for the ten (10) years prior to the filing of the application.

C) A full criminal history or the applicant including, but not limited to misdemeanor and juvenile offenses.

D) The operator's previous employer's for the ten (10) years prior to the filing of the application.

E) The applicant must also execute a waiver and release permitting the AEC and its investigator to secure information from the applicant's previous employer's.

F) The applicant's mental health history for the ten (10) years prior to the filing of the application.

G) The names, address and telephone numbers of any and all other live adult entertainment businesses which the operator is a partner, employee, stock-holder, sole proprietor or has any affiliation or association as either an owner or operator.

H) The applicant must also execute a waiver and release permitting the AEC and its investigator to secure information from the applicant's previous employer's, the Indiana State Welfare Department, the Kentucky State Welfare Department and the United States Justice Department. Moreover, the applicant appear at the Jeffersonville Police Department for finger printing.

I) The applicant must also present three (3) forms of photographic identification. If it is

determined by the AEC that these forms of identification are insufficient the applicant request shall be denied.

J) The applicant must provide written statements from not less than three (3) bona fide residents of the City of Jeffersonville setting forth that the applicant is of good moral character.

* * *

6. Operator's Employment Limitation: No one shall be granted a license to operate an adult entertainment business in the City of Jeffersonville if that individual is employed in any capacity by any other adult entertainment business. This prohibition includes employment at an adult entertainment business in any City, County, or State within the United State of America, Canada or South America.

A) If any operator receives a license from the City of Jeffersonville and it is later determined that the operator is employed by any other adult entertainment business said operator's license shall be immediately revoked and said operator shall be fined Two Thousand Five Hundred Dollars ($2,500).

B) Moreover, the owner of the adult entertainment business wherein the operator was employed shall immediately have his owner's license suspended for a period of not less than ninety days (90) nor more than one

hundred eighty days (180) and shall be fined Two Thousand Five Hundred Dollars ($2,500).

C) That the owner shall have burden of notifying the AEC its agent and/or designee when an operator is no longer employed by the owner. The owner shall be prohibited from asserting the defense of "lack of knowledge" of the operator's additional employment.

D) Burden upon Owner: The owner shall have the burden of knowing that employment history of his operator's. The owner shall be presumed to have knowledge of whether or not an operator is employed by another adult entertainment business while serving as a licensed operator on behalf of the owner.

7. Entertainer License: Any person who shall serve as an entertainer as a place for live adult entertainment shall apply in writing to the office of the Jeffersonville Building Commissioner, upon a form to be furnished by the Jeffersonville Building Commissioner. The form shall require the following information as well as any and all other information deemed appropriate by the AEC:

A. The name, address, telephone number, social security number and date of birth of the entertainer.

B. The entertainer's previous address for the ten (10) years prior to the filing of the application.

C. A full criminal history of the applicant including, but not limited to misdemeanor and juvenile offenses.

D. The entertainer's previous employer's for the ten (10) years prior to the filing of the application.

E. The applicant must also execute a waiver and release permitting the AEC and its investigator to secure information from the applicant's pervious employer's, the Indiana State Welfare Department, the Kentucky State Welfare Department and the United States Justice Department. Moreover, the applicant appear at the Jeffersonville Police Department for finger printing.

F. The applicant's mental health history for the ten (10) years prior to the filing of the application.

G. The names, address and telephone numbers of any and all other live adult entertainment businesses which the applicant is a partner, employee, entertainer stock-holder, sole proprietor or has any affiliation or association as either an owner or operator.

H. The applicant must also present three (3) forms of photographic identification. If it is determined by the AEC that these forms of identification are insufficient the applicant request shall be denied.

I. The applicant must provide written statements from not less than three (3) bona fide residents of the City of Jeffersonville setting forth that the applicant is of good moral character.

J. A certificate from a medical doctor designating that the applicant has, within the 30 days immediately prior thereto, been examined and found to be free of any contagious or communicable disease. Including, but not limited to venereal disease, H.I.V., Hepatitis or other such diseases.

* * *

10. Entertainer's Employment Limitation: No one shall be granted a license to entertain at an adult entertainment business in the City of Jeffersonville if that individual is employed in any capacity by any other adult entertainment business. This prohibition includes employment at an adult entertainment business in any City, County, or State within the United States of America, Canada or South America.

NEIGHBORHOOD DETERIORATION
and the
LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS
in
ST. PAUL

Prepared by the

COMMUNITY CRIME PREVENTION PROJECT
of the
Minnesota Crime Control Planning Board
and the
Division of Planning
DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
of the
City of St. Paul

April, 1978

In May of 1977, the Community Crime Prevention project of the Minnesota Crime Control Planning Board released a study which indicated a strong clustering of crimes around on-sale liquor establishments in Minneapolis. Subsequent to the issuing of this report, the city of St. Paul, through the city council and the mayor's office, became concerned about the impact which adult entertainment had on the neighborhoods in which they were located. These mutual interests and experiences of the city of St. Paul and the Community Crime Prevention project combined to produce this report.

NEIGHBORHOOD DETERIORATION and the LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS

INTRODUCTION

Bars, X-rated theaters, bookstores, specializing in pornography, massage parlors and other adult entertainment businesses are generally thought to deteriorate the neighborhoods in which they are sited. These establishments are believed, for instance, to attract unsavory outsiders, set bad examples for minors or otherwise lessen the desirability of the affected neighborhoods as places to live.

Despite this widespread concern about the impact of various adult entertainment facilities, little research has been conducted on the effect of these establishments on the neighborhoods in which they are located. A study of the effects of sexually oriented businesses in California found that areas with high concentrations of these establishments generally showed a relative decrease in property values when compared to areas without such establishments.

However, the study determined that these concentrations of sex-oriented businesses *were not the primary cause* of the lowered property values.[1] A study in Minneapolis of the spatial distribution of crimes around facilities with on-sale liquor licenses showed a distinct pattern of clustering of crimes within one-tenth of a mile of these establishments.[2] However, no studies have been conducted of the overall effect which all adult entertainment establishments (both alcohol-serving and sexually oriented) have on their surrounding neighborhoods. The following study was designed to investigate the effects of a variety of adult entertainment facilities in St. Paul upon the character of the neighborhoods in which they are located.

* * *

ADULT ENTERTAINMENT ESTABLISHMENTS, 1970-1976

A list of all adult entertainment establishments existing in St. Paul during the study period of 1970-1976 was complied by the St. Paul Planning Division. Establishments were classified as either alcohol-serving businesses or as sexual businesses, which included adult bookstores, adult theaters, and saunas. Alcohol-serving establishments were further classified as to whether they had a tavern (live entertainment) license and, if so, whether such entertainment was sexual in nature. This information was verified, with the aid of the city licensing division's records and the city policy

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[1] *Study of Effects on the Concentration of Adult Entertainment Establishments in the City of Los Angeles*, (Los Angeles: City Planning Department) June 1977.

[2] *Crime in Minneapolis: Proposals for Prevention*, (St. Paul, Minn.: Governor's Commission on Crime Prevention and Control, May, 1977).

department, for the initial and final study time-points, 1970 and 1976.[1]

This classification system results in the following adult entertainment establishment types:

I. Alcohol-serving establishments.
   - A. Alcohol-serving, without live entertainment
   - B. Alcohol-serving, with live entertainment
     1. Nonsexual entertainment
     2. Sexually oriented entertainment

II. Sexually oriented establishments
   - A. Sexual only (adult bookstores, theaters, and saunas)
   - B. Alcohol-serving, with sexually oriented entertainment (same establishments as in B-2 above)

* * *

The number of all adult entertainment establishments (all alcohol-serving and sexually oriented establishments combined) present in neighborhoods in 1970 is significantly related to the neighborhood quality.[1]

[1] Although the possession of a license for live entertainment was verified for each establishment, it could not be ascertained from the records whether all of these establishments classified as having sexually oriented live entertainment were those known by the city police department to offer exclusively sex-oriented entertainment. Establishments which had lingerie or swim wear luncheon shows, etc., for only brief periods of the study time were not classified as sexually oriented.

[1] Throughout this study, the presence or absence of a relationship is determined by statistical significance. That is, the statement "a relationship was found . . ." indicates that the analysis results were significant at the $p \leq .05$ level; the statement "no relationship was

That is, neighborhoods with higher crime rates and lower median housing values in 1970 tend to have more adult entertainment facilities located in them. Specifically, neighborhood quality in 1970 is related to the number of alcohol-serving establishments. When types of alcohol establishments are studied, neighborhood quality shows a relationship to the presence of establishments without live entertainment licenses, but has only a (statistically) marginal relationship to establishments with live entertainment licenses. No relationship is found between neighborhood deterioration and the number of sexually oriented establishments present in 1970.

A similar pattern of association appears in the 1976 analyses. The number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) in 1976 is significantly related to neighborhood quality. As in 1970, this relationship is seen for the number of alcohol-serving establishments. This relationship between neighborhood quality and liquor-serving establishments in 1976 is present for both entertainment – and nonentertainment – licensed facilities (although the relationship is stronger for the establishments without entertainment licenses). Again, as in 1970, no relationship is found between neighborhood deterioration and the presence of sexually oriented establishments.

In summary, as shown in Table 1, the present of all adult entertainment establishments (alcohol-serving and sexually oriented combined) tends to be associated with greater neighborhood deterioration in both 1970 and 1976. *However, when types of adult entertainment establishments are studied separately, this relationship is*

found . . ." indicates that the analysis results were *not* significant at the $p \leq .05$ level.

found only for the alcohol-serving establishments, not for sexually oriented facilities.

* * *

These analyses show the same overall pattern of results as found in Stage I. For both 1970 and 1976, the presence of all adult entertainment establishments (alcohol-serving and sexually oriented combined) is related to neighborhood deterioration. As in Stage I, when adult entertainment establishment types are analyzed separately, the relationship is found only for alcohol-serving establishments. Neighborhood quality/deterioration is significantly related to the total presence of alcohol-serving establishments, and to the presence of establishments without live entertainment licenses. The relationship found between deterioration and entertainment-licensed establishments in Stage I does not persist after zoning and neighborhood age are controlled. As in Stage I, there is no relationship, in either 1970 or 1976, between neighborhood deterioration and the presence of sexually oriented establishments.

In summary, as shown in Table 2, a relationship between neighborhood quality and the number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) located in the neighborhood does persist after introducing controls. This relationship is found for the alcohol-serving adult entertainment facilities studied but not for the sexually oriented establishments. These same patterns of association are present for both 1970 and 1976. *Therefore, the relationship between neighborhood deterioration and the presence of all adult entertainment establishments is more accurately viewed as a relationship between neighborhood deterioration and the presence of all alcohol-serving establishments.*

* * *

TABLE 2
SUMMARY OF STAGE II:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]

Type of Adult Entertainment Establishment	1970 Deterioration and 1970 Establishments	1976 Deterioration and 1976 Establishments
All Establishments: (alcohol serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:		
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
Sexually Oriented	Not Related	Not Related

[a]The presence of relationships is statistically significant, $p < .05$.

* * *

In conclusion, as shown in Table 3, adult entertainment facilities tend to be established in areas of relative deterioration. A pattern of deterioration appears to follow the locations of certain types of adult entertainment establishments. This could be an increase in the pattern of deterioration *already present. This cycle of "deterioration-adult entertainment-deterioration" is seen only for areas in which there are alcohol-serving establishments.* Sexually oriented establishments, when analyzed by themselves, do not

show this cyclic pattern of relationship with neighborhood deterioration.

* * *

TABLE 3
SUMMARY OF STAGE III:
Relationships between Adult Entertainment Establishments and Neighborhood Quality/Deterioration Controlled for Legal/Market Influences[a]

Type of Adult Entertainment Establishment	1970 Deterioration and 1970 Establishments	1976 Deterioration and 1976 Establishments
All Establishments: (alcohol serving and sexually oriented combined)	Related	Related
ALCOHOL-SERVING:	Related	Related
Without entertainment licenses	Related	Related
With entertainment licenses	Not Related	Not Related
Sexually Oriented	Not Related	Not Related
Although adult entertainment establishments tend to locate in already deteriorated neighborhoods, there is a stronger tendency for deterioration to follow the location of adult entertainment establishments.		

[a]The presence of relationships is statistically significant, $p < .05$.

* * *

E. SUMMARY OF FINDINGS

A summary of the relationships found in Stages I through IV is presented in Table 5.

[Insert Table 5]

STAGE I: *Does deterioration tend to occur in the same areas of the city as adult entertainment businesses are located, in 1970? in 1976?*

The presence of all adult entertainment establishments (alcohol-serving and sexually oriented combined) tends to be associated with greater neighborhood deterioration in both 1970 and 1976. However, when types of adult entertainment establishments are studied separately, this relationship is found only for the alcohol-serving establishments, not for sexually oriented facilities.

STAGE II: *Does the relationship between neighborhood deterioration and adult entertainment persist even when other factors are controlled, in 1970? in 1976?*

A relationship between neighborhood quality and the number of all adult entertainment establishments (alcohol-serving and sexually oriented combined) located in the neighborhood does persist after introducing controls for legal and market influences. This relationship is found for the alcohol-serving adult facilities studied but not for the sexually oriented establishments. These same patterns of association are present for both 1970 and 1976. Therefore, the relationship between neighborhood deterioration and the presence of all adult entertainment facilities is more accurately viewed as a relationship between

neighborhood deterioration and the presence of all alcohol-serving establishments.

STAGE III: *Has deterioration in neighborhoods followed rather than preceded the location of adult entertainment businesses in the affected neighborhoods, during the 1970-1976 time period? That is, do adult entertainment establishments contribute to neighborhood deterioration?*

Adult entertainment facilities tend to be established in areas of relative deterioration. A pattern of deterioration appears to follow the locations of certain types of adult entertainment establishments. This could be an increase in the pattern of deterioration *already present.* This cycle of "deterioration-*adult entertainment*-deterioration" is seen only for areas in which there are alcohol-serving establishments. Sexually oriented establishments do not show this cyclic pattern of relationship with neighborhood deterioration.

STAGE IV: *Is the effect of adult entertainment on neighborhood quality/deterioration a threshold phenomenon? That is, does neighborhood quality show a marked deterioration after a critical number of adult entertainment establishments are located in an area?*

The number of adult entertainment establishments in a neighborhood has a strong threshold effect on associated neighborhood deterioration, for both 1970 and 1976. This means that the increase in deterioration associated with each additional establishment is not constant. The effect of each

additional adult entertainment establishment on neighborhood quality depends upon the number of such establishments already present in the area. The addition of an adult entertainment establishment to an area with more than one or two of these establishments already present is associated with a marked increase in neighborhood deterioration. When types of adult entertainment establishments are studied separately, threshold effects are found for the number of alcohol-serving establishments, not for the number of sexually oriented establishments present.

SUMMARY AND IMPLICATIONS FOR PUBLIC POLICY

These is statistically significant relationship between the number of adult entertainment establishments (alcohol-serving and sexually oriented combined) located in an area and the deterioration of that area as reflected in housing values and crime rates. This relationship was found to exist in both 1970 and 1976, even when legal and market influences such as light industrial/commercial zoning and neighborhood age are controlled for.

When types of adult entertainment establishments were studied separately, a significant relationship was found between neighborhood deterioration and the number of alcohol-serving establishments; in the presence of controls for legal and market influences, the number of alcohol-serving establishments without entertainment licenses was found to be most strongly related to neighborhood deterioration.

It should be noted, while the presence of sexually oriented establishments taken by themselves does not

show a significant association with neighborhood deterioration, these establishments tend to locate in areas which already reflect the effects of other adult entertainment establishments, making it difficult without further analysis to ascertain the unique contribution which sexually oriented establishments have on neighborhood deterioration.

From: **David Bugher**
To: **DHEID**
Subject: **Adult businesses**

Well, I have a depressing statistic. It's good in one way and bad another. Since incorporation, the City has amassed 15,415 reported criminal incidences. Get this, 25% occurred along a 300 acre strip of Pacific Highway and South Tacoma Way. How many incidences were within 1,000 feet of all adult entertainment establishments? 400! A lousy 400! That's only 2.6% of the total! Jack Burns will love this.

What bothers me is that many communities use the secondary effects of adult businesses (i.e. crime) to justify stricter codes. This aspect or element just doesn't seem to be present. Sure, there is a great amount of crime in the area, but it is associated with I-5 and the low income neighborhoods along I-5.

I have tried working this issue from a number of different angles. I have tried to focus on the types of criminal incidences (rape, burglary, vandalism) to see if such a corollary existed. It doesn't. I know this isn't what people want to hear, however, that is what is reported.

Dave